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A
SUPPLEMENT
TO THE
Reports in Chancery
OF

FRANCIS VESEY, SENIOR, Esq.

Barrister at Law, and late one of the Masters of the High Court of Chancery in
Ireland,

DURING THE TIME OF

LORD CHANCELLOR HARDWICKE.

COMPRISING

CORRECTIONS OF STATEMENT, AND EXTRACTS OF THE DECREES
AND ORDERS FROM THE REGISTRAR'S BOOKS, REFERENCES
TO THE CASES CITED, SUBSEQUENT DETERMINATIONS
ON THE SEVERAL POINTS, SOME MANUSCRIPT CASES,
NEW MARGINAL NOTES,

AND A COPIOUS INDEX.

By **ROBERT BELT, Esq.**

OF THE INNER TEMPLE, BARRISTER AT LAW.

FIRST AMERICAN, FROM THE LAST LONDON EDITION.

Philadelphia:

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1831.

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TO THE RIGHT HONOURABLE
JOHN LORD ELDON,
LORD HIGH CHANCELLOR,

&c. &c. &c.

Your Lordship having honoured this Production with so peculiar a sanction, will ever be to me a source of the greatest satisfaction.

I have certainly endeavoured with all industry to make it useful; and it is that endeavour alone which can embolden me to hope that its defects may be treated with indulgence.

Your Lordship and the Profession are aware that the valuable Reports, to which my Work is a Supplement, have long required an attempt of the kind; and hence it has, for many years, been my employment to supply their deficiencies.

In this pursuit I have frequently had to trace several Causes through a long course of time, to their ultimate result; and I have enriched my humble labours with the language of the Court,

by giving extracts from its Decrees and Orders at one of its best periods.

In doing this, my hope has been, that the double purpose may be answered of illustrating the Cases with which those Decrees and Orders are connected, and of affording useful precedents, that the Bar may be facilitated in the preparing of Minutes to carry into effect the judgments of the Court in other instances.

I have likewise inserted a few Manuscript Cases, which I trust will add to the value of the Work.

Your Lordship's gracious desire, "that the publication of my Work might be a Gift from you to the Profession," will never be effaced from my grateful remembrance.

From your Lordship's liberality the Publication is derived; and to your Lordship the Work is inscribed.

I have the honour to be,

My Lord,

With the utmost respect,

Your Lordship's ever faithful and
Obliged humble Servant,

ROBERT BELT.

THE Author is unwilling to dismiss his work, without acknowledgments to the Registrars of the Court, and the Gentlemen in the Report Office, for the facilities always afforded by them to every Member of the Bar in the Investigation of its Records.

**15, *New Boswell Court, Lincoln's Inn,* }
31st March, 1817. }**



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SUPPLEMENT
TO THE
REPORTS IN CHANCERY,
OF
FRANCIS VESEY, Senior.

LEE *versus* D'ARANDA [and COX] Hil. Vac. 1746-7.

(*Reg. Lib.* 1746. *B. fol.* 359.)

VOL. I. page 1.—S. C. 3 Atk. 419. Husband covenants to give his wife by deed or will 1000*l.* at his death if she survive him, but dies intestate. She is not entitled to her distributive share in addition to her claim under the covenant.

As to the distinction between cases of *Satisfaction* and of *Part Performance*, &c.

NOTES AND OBSERVATIONS.

THE report in *Athyns* states the Covenants nearly *verbatim* with the Registrar's Book.

They were as follows: "In consideration of the intended marriage, and of the marriage portion of *Martha D'Aranda*, and for the making a provision for the said *Martha*, *Charles Henry Lee* doth covenant that he will in his lifetime, either by his last will or by some good and sufficient assurance in the law, grant to *Martha*, or *Elizabeth D'Aranda* the mother, or her executors or administrators, in trust for the said *Martha*, and for her sole and separate use, 1000*l.*, to be paid to the said *Martha* after the decease of *Charles Henry Lee*, in case she shall survive him."

"And in case *Charles Henry Lee*, shall not, [2] by will or otherwise, in his lifetime, assure to *Martha* the said 1000*l.* that then the executors or administrators of *Charles Henry Lee*, shall, within the space of

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six months after the decease of *Charles Henry Lee*, pay to *Martha D'Aranda* the sum of 1000*l.* [in case she survived him] to and for her own use and benefit." R. L.

The Court declared that the defendant *Martha* was not entitled to the sum of 1000*l.* by virtue of the marriage articles as a debt out of the Intestate's estate, and to her distributory share by virtue of the statute, &c. in case such distributory share should amount to 1000*l.*, or any greater sum. And after the usual decree for an account, it was ordered, "That the Master should state the amount of the surplus of the intestate's personal estate two ways, viz. with a deduction of the sum of 1000*l.* (mentioned in the articles) as a debt, and without a deduction of any such debt." Reserving further directions. R. L.

The case cited in the report called *Oliver v. Brighthouse* is *Oliver v. Brickland*, 3 *Atk.* 420: *Barret v. Beckford*, cit. *ibid.* is in 1 *Ves.* 519.

Lord ELDON, C. observed, that *Lee v. D'Aranda*, and *Blandy v. Widmore*, (1 *P. W.* 324.) remain unimpeached, notwithstanding *Haynes v. Mico*, 1 *Bro.* 129, and *Devese v. Pontet*, *Finch's Prec. Ch.* 240. See in *Garthshore v. Chalie*, 10 *Ves.* 13, 14.

[3] As to the cases of SATISFACTION, PERFORMANCE, &c. see the principal of them collected in Mr. Cox's note to *Blandy v. Widmore*, 1 *P. W.* 324, and in *Garthshore v. Chalie*, 10 *Ves.* 1, &c.

Note particularly in the latter case, the elaborate judgment of Lord Eldon, C. containing his Lordship's observations on the principal case of *Lee v. D'Aranda* and *Cox*, as well as on the various others, which are most valuable.

SCOTT *versus* MERRY, Hil. Vac. 1746-7.

(*Reg. Lib.* 1746. *B. fol.* 473.)

VOL. I. page 2.—Plaintiff having prevented the fulfilment of an agreement in favour of the defendant *M.* for purchasing the

assignment of a mortgage, by obtaining it himself at an advance, after notice, not allowed to take advantage of it, being *mala fides*. Evidence therefore of a parol agreement read against him under these circumstances. (1)

NOTES AND OBSERVATIONS.

THE bill prayed that such of the defendants as were entitled to the equity of redemption, might either redeem or be foreclosed; and that the release of the equity of redemption given to *Merry* might be set aside, as fraudulent against the plaintiff.

The defendant *Merry's* answer insisted upon having an assignment of the mortgage, on payment only of the sum of 227*l.* 10*s.* in pursuance of the agreement.

This answer is entered as read at the hearing, together with the deeds stated in the pleadings and several letters relative to the purchase under the agreement, &c. The cause was terminated by consent.

The decree referred it to the Master, to take [4] an account of what was due to the plaintiff on the principal sum of 240*l.* (which he had paid for the assignment) with interest at 5 *per cent.* from the time of its advancement, and to tax him his costs of the ejectment brought, and in that court.

And it directed that the defendant *Merry* should pay the result within six months from the date of the report, whereupon the plaintiff should re-convey and re-assign, &c.

It appears that *Merry* had filed a cross bill, which was by consent dismissed without costs.

Richards v. Syms, cited in the report, is in *Barn. Ch. Rep.* 90, and 2 *Eq. Ca. Ab.* 617, pl. 2.

(1) Lord *Hardwicke*, in *Richards v. Syms*, stated a point which would have assisted the defendant here if requisite, *viz.* that a person may rebut an equity as a defendant, in many cases where he cannot sue, and claim an equity as a plaintiff. See also (as to this point) in *Wollam v. Hearn*, *Ves.* 211, &c.

CARTE *versus* BALL, E. T. 1747.

(*Reg. Lib.* 1746. *A. p.* 704.)

VOL. I. page 3.—S. C. 3 Atk. 496, quod vide.

Vicar failing in a suit for tythes in kind, and a modus set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such a modus. (1)

NOTES AND OBSERVATIONS.

NOTWITHSTANDING what is said in the report of the non-admission in evidence of the grant or endowment in 1209, it appears from *Reg. Lib.* that there were [5] read at the hearing (*inter alia*) a copy of the registry of the Bishop of *Lincoln*, of the endowment of the vicarage in 1209; and an extract from a roll of institutions to benefices remaining in that registry.

Richards v. Evans, cited in the report, is at p. 39. of the volume.

(1) The case of tythes is, however, peculiar; for a plaintiff in a bill for specific performance of an agreement which he cannot substantiate, is not allowed to resort to a different agreement proved or set forth by a defendant. Vide *Legal v. Miller*, 2 *Vesey*, 299. and *Mortimer v. Orchard*, 2 *Ves.* jun. 243. But nevertheless a defendant may, in such a case, have a decree on the agreement, such as he has proved it to be. *Fife v. Clayton*, 13 *Ves.* 546. and *Gwynn v. Lethbridge*, 14 *Ves.* 585.

ELTON *versus* ELTON, E. T. 1747.

(*Reg. Lib.* 1747. *A. fol.* 396.)

VOL. I. page 4.—S. C. 1 Wils. 159. and 3 Atk. 504. quod vide. Devise of 1500*l.* to a grand-daughter to be at her own disposal, if she married with consent, and not otherwise. She died at 19, not having been married. Held, that the vesting depended on her marriage, and her representative, therefore, not entitled.

NOTES AND OBSERVATIONS.

THE bill dismissed. *Reg. Lib.*

So *Atkins v. Hiccocks*, 1 *Atk.* 500. and *Garbut v. Hilton*, *ibid.* 381. which are cited also in the report. It must, however, be noticed, that Lord *Alvanley*, when M. R., made a distinction between the case of a *legacy*, and that of a *residue*; and held that a share of a *residue* vested in a party, unto whom it was directed by will to be transferred "immediately after her marriage," although she died unmarried. *Booth v. Booth*, 4 [6] *Ves.* 399. His Honour seems to have decided this after great consideration; observing, that every intestament was to be made, against holding a man to die intestate, who sits down to dispose of the residue of his property. See his Honour's distinction of the case before him from the principal one, *Atkins v. Hiccocks*, &c. in 4 *Ves.* 406. *Ward v. Trig.* cited p. 5. is in 3 *Atk.* 505.

WELFORD *versus* BEZELY, May 23, 1747.

(*Reg. Lib.* 1746. B. fol. 355.)

VOL. I. page 6.—S. C. 3 *Atk.* 503. See *ibid.* 501. A mother agreeing to give her daughter 1000*l.* which by the daughter's marriage article was to be settled for her separate use, decreed to perform it. Her signature to those articles as a witness (1) (she knowing the contents) is sufficient evidence of the agreement therein recited within the Statute of Frauds, although she was not in terms a party to them. (2)
Mutual credit under copartnership agreement.

NOTES AND OBSERVATIONS.

(1) LORD *Hardwicke* states it as undeniable from the evidence, that the mother knew the contents. She had, however, in her answer, denied knowing "whether the articles were to the effect charged in the bill; she never having had any counterpart, duplicate, or copy, thereof;

and moreover, denied that the articles were executed with her approbation." *Reg. Lib.*

(2) In the report in *Athyns*, Lord *Hardwicke* says, "the word 'party' in the statute is not to be construed 'party to a deed' but person in general." See likewise the report in *Vesey*. Mr. Baron *Eyre* also says, in *Stokes v. Moore and Wife*, 1 *P. W.* 771. note(1). "The signature required by the statute is to have the effect of giving authenticity to the whole instrument; and where the name is inserted in such a manner as to have that effect, it does not much signify in what part of the instrument it is to be found; as in the formal introduction to a will."

[7] The original decree had directed the Master to inquire, on what account the entry of the 1000*l.* was made in the partnership books, and what was the consideration thereof; and what each of the parties really and truly advanced on account of the partnership. Upon the present appeal this part of his Honour's decree was reversed; the Court declaring, "It appeared that the entry of 1000*l.* credit given the defendant *J. W.* in the partnership books, was upon account of the sum of 1000*l.*, the defendant *J. W.*'s wife's portion, then remaining in the hands of her mother."

The Court declared, "That the defendant *J. W.* ought to indemnify the said *H. B.* in respect of what she should pay for the 1000*l.* and interest, so far as it should appear he had received satisfaction for the same in the partnership account: his Lordship reserving any directions touching that indemnity until after the Master should have made his report. But in case the said *H. B.* should pay the said 1000*l.* and interest, pursuant to His Honour's decree, then, it was ordered, that the defendant *J. W.* should pay so much money as the sum of 1000*l.* and interest should amount to into the Bank, &c. without prejudice on either side." *Reg. Lib.*

WHELPDALE *versus* COOKSON, E. T. 1747.(1)

(*Reg. Lib.* 1748. *B.* fol. 552.)

VOL. I. page 9.—Trustee not to derive advantage from a purchase of Trust Property.

NOTES AND OBSERVATIONS.

(1) It appears that the cause was heard at this time, and a decree made, although it is not entered in *Reg. Lib.*, and that the reason of this was, that the plaintiff, who lived in Cumberland, had died before the hearing, although it was not known at the time. The suit therefore having abated, the decree became void. The cause, however, having been revived, was heard on the 31st of January, 1749. See *Reg. Lib.* 1748. *B.* 552. It appears from thence that there was no charge in the bill as to the point mentioned in the report, although the decree recites it as a question arising in the cause. The bill was filed by a creditor against the defendants as executors and trustees; and after praying an admission of assets, or an account, &c. prayed the specific performance of an agreement relative to the premises in question. It stated for this purpose, that the plaintiff having obtained judgment by default against the defendant *Cookson* in an action, and intending to execute a writ of inquiry thereon, was dissuaded by him from doing so; and prevailed upon by him to prosecute an ejectment at her own expense, upon the demise of *Cookson* and others, to recover the property in question, the benefit of which it was agreed, by writing, she should have towards her debt. It then stated that judgment being signed therein, &c. [9] that the Sheriff delivered possession to the defendant, in trust for the plaintiff, but that he refused to pay the debt, or turn over the property to her.

The defendant *Cookson* admitted signing the agreement under circumstances palliating his own conduct. The de-

defendants in general, insisted that it being necessary to dispose of their testator's real estate, they ordered the premises in question, and some others, to be sold by auction together; but that no one choosing to bid for the same together, they were put up separately, and 103*l.* being the highest price bid for the premises in question, whereon one Mr. *W. B.* bid 104*l.* on account of the defendant *Cookson*, and no more being bid for the same, he was reported the best purchaser; and that the premises were conveyed by the defendants to *W. B.* and his heirs, in consideration of that sum, and were afterwards conveyed by him to the defendant *Cookson*, who, "insisted, that the said purchase was an honest one, and for a valuable consideration; and hoped to have the benefit thereof." He stated also, that he had laid out a considerable sum in improving the premises.

The decree after directing the usual accounts, &c. and also that the late plaintiff's estate should be in the first place paid such costs as she had been put to in the ejectment, proceeded thus: "And a question arising in the cause, whether a purchase insisted upon by the defendant *Cookson*, to have been made of part of the said premises in question, called the *Green Dragon*, ought to stand or not, the said defendant *Cookson* being a trustee; his

[10] Lordship declared, that the same ought to be put up to sale before the said Master, in case the majority of the said creditors make their election before the Master, whether the same shall be put up to a new sale or not; and, if the majority of the said testator's creditors shall elect that the same shall be put up to a new sale, then it is ordered and decreed, that the said premises, called, &c. shall be sold with the approbation, &c. And the said Master is also to take an account of the rents and profits of the said premises accrued since the said testator's death, which have been received by the defendant *Cookson*, or, &c. but in such a case the said rents and profits, and money arising by the

said sale, are to be applied, in the first place, to reimburse the said defendant what he has paid towards his purchase money, with interest for the same, at the rate of 4 *per cent. per annum*, from the respective times of payment thereof, and also what he has laid out for lasting improvements, with interest for the same, at 4 *per cent. &c.*" for which purpose the Master was to take an account. But in case the majority of the creditors should elect, that the purchase made by the said defendant should stand, then he was to account before the Master for the purchase money, at the rate he bought the said estate, and was to retain the rents and profits from the time of such purchase, &c. *Reg. Lib.*

Although there is no positive rule, that a trustee to sell shall not, in any case, be himself the purchaser, inasmuch as he is not precluded from entering [11] into a new contract with his *cestui que* trust, yet he is not permitted, in any other case to make a profit to himself. *Whichcote v. Lawrence*, 3 *Ves.* jun. 740. Upon which, see Lord *Eldon* C.'s observations, 6 *Ves.* 626.

The purchase in *Coles v. Trecothick*, 9 *Ves.* 234, was supported upon the ground of a distinct and clear contract with the *cestui que* trust, he having the fullest information, and having the sole management; the trustee being passive as to the latter circumstance. *Fox v. Macreth*, 2 *Bro.* 400, and affirmed on appeal in *Dom. Proc.* in 1791, is considered as a leading case in support of the rule that a trustee for sale shall not take advantage of his situation so as to purchase for his own benefit.

To set aside such a purchase, it is not incumbent upon the party to show that the trustee has made an advantage, 8 *Ves.* 348; but it is in the choice of the *cestui que* trusts to judge for themselves whether they will take back the property or not, 6 *Ves.* 627; so that in such a case the trustee can never be allowed to retain an advantage, but

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may suffer a loss, *Lister v. Lister*, 6 *Ves.* 631, and the principal case *ubi supra*.

This doctrine is not confined to trustees, but extends to assignees under commissions of bankrupt, solicitors, agents, and in short, all persons having a confidential character, *ex parte Lacey*, 6 *Ves.* 625; *ex parte Hughes*; *ex parte Lyon*, *ibid.* 617; *ex parte Atwood and Owen v. Foulkes*, cited *Ibid.* 630, note (b); *ex parte James*, 8 *Ves.* 337. See

McEnzie v. York Buildings Company, *Dom.*

[12] *Proc.* cited 6 *Ves.* 630. Note, the principle being as above, it seems that the sale being by auc-

tion makes no difference. See 8 *Ves.* 348, with some observations of Lord Eldon C. on this particular case of *Whelpdale v. Cookson*. *Et vide* in *Nelthorpe v. Pennyman*, 14 *Ves.* 517.

The substance of the decree in this case is shortly stated in a note to 5 *Ves.* jun. 682; but the author of this work has given the above extract rather more at length on account of *Whelpdale v. Cookson* having been doubted by very high authority, with reference to the note in 5 *Ves.* above referred to. See *per* Lord Eldon C. in 8 *Ves.* 438.

FLANDERS *versus* CLARK, E. T. 1747.

(*Reg. Lib.* 1746. *A. fol.* 656.)

VOL. I. page 9.—S. C. 3 *Atk.* 509. Legacy to J. F. the principal to be paid as her executors should judge necessary for him; but that he should not give it to his wife; and if he died *without issue*, that it should revert to testatrix's family: giving interest, however, in the "mean time for what should continue in the executors hand till all was paid." A surviving executor directs payment of the legacy within two years. The discretionary power survived having been given to the parties *qua* executors, and the whole property vested by the direction.

NOTES AND OBSERVATIONS.

THE legacy was given by M. F. "to her son J. F. to be paid to him by her executors therein named, at such

time and in such proportions as they should judge necessary for him; &c. But in the mean time, she directed her executors by half yearly payments to pay him interest at the rate of 5 *per cent.* for such parts of the said principal, as should from time to time continue in their hands, till the whole was paid." *Reg. Lib.*

The surviving executrix directed (by her will,) the legacy to be paid within two years from her own death.

See also the report of the judgment in 3 *At-* [13]
kyns, 509.

Lord *Hardwicke* there adds, "Her intention seems to be that her executors should have a power of paying the whole, or a part, as the trade, dealings, or occasions of the son should require; and that he might dispose of this as he thought proper: but that while any part of it remained in the executor's hands it should be subject to the will."

As to such remote limitations of personalty as would, if applied to real estate, create an entail, and the consequent vesting of such bequests in the first taker, see Mr. *Saunders'* note to *Hodgson v. Bussey*, 2 *Atk.* 89, and *Fearne's* Exec. Dev. 144, 161, 167, *et seq.* *Et vide Butterfield v. Butterfield*, 1 *Ves.* 133, *et post.*

RIDOUT *versus* PAINE, May, 1747.

(*Reg. Lib.* 1746. B. fol. 508.)

VOL. I. page 10.—S. C. 3 *Atk.* 486. Devise of *all the remainder* of testator's goods and *real estates*, will pass all his interest and the inheritance in the lands, including reversions; although the devisee had a devise of an estate for life in part of the latter.(1)

Award may be relieved against, where a clear mistake in fact or law.

NOTES AND OBSERVATIONS.

SEE the report in *Atkyns* for a full statement of the case, arguments, and decree.

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The statement there agrees with *Reg. Lib.* except in the words immediately following the devise for life to the testator's sister. In *Reg. Lib.* they are as follows: "And after the death of the said *Elizabeth*, and the said *Mary*, the said testator gave the said farm and lands at Ovingdean."

[14] This seems material, as the words thus omitted include the moiety, which had been settled on the plaintiff *Elizabeth* by way of jointure, as well as the two moieties of the unsettled part. The decree, which is accurately stated in *Atkyns*, proceeds on this ground. *Chester v. Chester*, cited by Lord *Hardwicke*, is in 3 *P. W.* 56—63. Add to which what appears 1 *Ves.* 228. 2 *Ves.* 48, &c. *Cowp.* 808, 299. *Prec. Ch.* 202, and 7 *Ves.* 541, &c.

See 2 *Ves.* page 11.

CITY OF LONDON *versus* NASH, May, 1747.

(*Reg. Lib.* 1746. *B. fol.* 475. entered *Mayor of, &c.*)

VOL. I. page 12.—S. C. 3 *Atk.* 512. Lessee, covenanting to rebuild several houses, does not perform it, by re-building some, and repairing others; although at a considerable expense. Issue directed of *quantum damnificatus*. (1)

NOTES AND OBSERVATIONS.

SEE this case reported rather more fully in *Atkyns*.

(1) "The Court declared, it appeared that *Greaves*, the lessee, was only an agent and trustee for the defendant *Nash*, in contracting for and accepting the said lease, and that the true intent and meaning of the contract of the 8th of December, 1736, and also of the said lease was, that the lessee should rebuild all the messuages then being upon the ground demised by the lease; and ordered the parties to proceed to a trial at law upon an issue to try how much the plaintiffs were damnified by *Greaves* or *Nash* not

having rebuilt all the messuages in a workmanlike manner, but only having repaired the same in [15] such manner as they had been repaired by *Greaves* and *Nash*, or either of them. The plaintiffs in equity to be the plaintiffs at law, and *Nash* to be the defendant." *R. L.*

Lord *Thurlow* C. disapproved of the Court's interference as to covenants to rebuild, notwithstanding this case, and *Allen v. Harding*, 2 *Eq. Ab.* 17.

See in *Lucas v. Comerford*, 3 *Bro.* 166, and 1 *Ves. jun.* 235.

But it seems, upon the whole, that specific performance of such a covenant would still be decreed where the courts of law cannot give an adequate satisfaction in damages; and where the agreement is sufficiently certain, distinct, and defined in its nature. See *Mosely v. Virgin*, 3 *Ves.* 184.

Et vide arguendo, et per M. R. in Flint v. Brandon, 8 *Ves.* 161, 162, &c.

HAWES versus HAWES, Trin. T. June 26, 1747.

(*Reg. Lib.* 1746. *A.* fol. 707.)

VOL. I. page 13.—S. C. 3 *Atk.* 524, and 1. *Wils.* 165. Devise of lands to four younger children equally, share and share alike as tenants in common and not as joint tenants, with benefit of survivorship. This referring to a former survivorship, is a tenancy in common, with a limitation to the survivors, after the death of any of them before 21, without issue. See *Mendez v. Mendez*, 1 *Ves.* 89, and *Stones v. Heurtly*, 165, *post* &c.

NOTES AND OBSERVATIONS.

THE recital, and what relates to the customary and testamentary parts (which are relied on in the judgment) are not stated in *Reg. Lib.*

The words of the devise by the son, as in *Reg. Lib.*

are "equally to his three children, and their
[16] heirs, as tenants in common, and to the survivor
 of them, and the heirs of such survivors, when
they should attain their age of 21 years, or marriage," &c.
R. L.

As to what Lord *Hardwicke* observes (p. 14.) with regard to the words in a devise, "to all equally" importing a tenancy in common, see *Blissett v. Cranwell*, 1 *Salk.* 226, and the cases cited in the margin, (S. C. 3 *Lev.* 373) upon which see per Lord *Hardwicke*, 1 *Ves.* 167. *Et vide* *Stones v. Heurtly*, 1 *Ves.* 165. *Prince v. Heylin*, 1 *Atk.* 493. *Owen v. Owen*, *ibid.* 494. *Rigden v. Vallier*, 3 *Atk.* 733. *Campbell v. Campbell*, 4 *Bro.* 15, &c. As to the period unto which survivorship is generally to be referred, see 1 *Ves.* 90 and 167. *Russell v. Long*, 4 *Ves.* 551, 554. *Per M. R.* 7 *Ves.* 286. The case of *Bindon v. Lord Suffolk*, though decided ultimately in *Dom. Proc.* has been doubted. See *per M. R.* 4 *Ves.* 554. See also 2 *Ves. jun.* 638, and *Roebuck v. Deans*, 2 *Ves. jun.* 265, and 4 *Bro.* 403, S. C. *Stringer v. Phillips*, 1 *Eq. Ca. Ab.* 292. *Rose v. Hill*, 3 *Burr.* 1881, 1885. *Perry v. Woods*, 3 *Ves.* 204. *Maberly v. Strode*, *ibid.* 450. See also *Cambridge v. Rous*, 8 *Ves.* 12, &c.

The profession will find a distinction between those cases where the period of survivorship has been confined to the death of the testator, and those which are referred to Lord *Hardwicke's* doctrine in the principal case, accurately stated in that very useful and comprehensive work, *Mr. Roper's Treatise on Legacies*, 2 vol. 268 *et*
[17] *seq.* 279 *et seq.* in which the several cases are not only collected and referred to, but shortly stated, with the judgment on each fully.

It ought to be observed, that although Lord *Hardwicke* refers to the disposition of the testamentary part by the will as a key to the rest (page 14,) that part of the will does not appear in *Reg. Lib.*

The Court declared "That the share of *C. H.* one of the younger children of the said *A. H.* the elder, in the real estate devised by his will to his younger children, did, upon his the said *C. H.*'s death under the age of 21 years without issue, descend to the surviving younger children." *R. L.*

ELLIOT *versus* COLLIER, July 1, 1747.

(*Reg. Lib.* 1746. *A.* fol. 536.)

VOL. I. page 15.—S. C. 3 Atk. 526. Executor of husband who survived his wife but did not take out administration, is entitled to her share under the Custom of London, and her administrator is but a *trustee* for him. Personal presents, &c. no advancement so as to bar the customary share: neither was maintenance, though after marriage; the same being charged against her as a debt under the will.

NOTES AND OBSERVATIONS.

IN case the daughter should not execute the release, the testator directed that "The devise of a freehold estate he had given her in Bishopsgate-street was to cease," over and besides the annual sum which was to be deducted for her maintenance, as mentioned in the report. *R. L.*

The statutes referred to in the argument are 31 *Edw.* III. c. 11, and 21 *Hen.* VIII. c. 5.

The case of *Hearne v. Baker*, adverted to by Lord *Hardwicke*, is in 3 *Atk.* 213.

See the decree in the principal case stated in 3 *Atkyns* 529; which agrees with *Reg. Lib.*

LADY HEAD *versus* SIR F. HEAD, July 4, 1747.

(*Reg. Lib.* 1746. *A.* fol. 626.)

[18]

VOL. I. page 17.—S. C. 3 Atk. 295, and 547. Baron and Feme. Separate maintenance, &c.

NOTES AND OBSERVATIONS.

THIS case is reported more accurately and fully in 3 *Atkyns*.

The letter alluded to in 1 *Ves.* 17, is stated *verbatim* 3 *Atk.* 547.

The defendant admitted the letter in his answer, but insisted that he did not intend it as an agreement for a separation, or as an agreement for a separate maintenance, or otherwise than what he thought a proper allowance for the maintenance of the plaintiff and her daughter, whilst she continued under the care of her father (who was a physician,) and not otherwise, or for any longer time. The defendant, besides denying all the rest of the case made by the bill, stated, that he had for a long time, and from time to time since the plaintiff left her father's, desired and pressed her to come home and live with him; but that she had refused, and had for a long time lived and kept company with low and mean people, &c. which had given him great uneasiness. That he was ready and willing to maintain her at home in a manner suitable to her degree as his wife, and that it was, and would be, proper for her to be at home in her own house, with her own servants about her, and where she could have proper assistance and care taken of her, and not to move [19] from lodging to lodging, in a low mean way, as she had for some time past done, &c. &c. The answer also stated circumstances tending to show her derangement, and impropriety of conduct, and that the plaintiff had for a considerable time, and did then, lodge and live at the house of a person who was a common player; and that she had continued to live so, contrary to the advice and request of her mother, &c. &c. Insisting that he was not obliged to maintain her abroad, and in a manner of life inconsistent with her own honour, or that of the defendant and his family. *Reg. Lib.*

As to the case of *Whorwood v. Whorwood*, 1 *Cha. Ca.*

250, which appears relied upon in 1 *Ves.* 19; Lord *Hardwicke* is reported to say in 3 *Atk.* 296, that "it was determined during the usurpation, and whilst the jurisdiction of the Ecclesiastical Court was suspended."

The decree states, that "the defendant having offered by his answer to receive and maintain the plaintiff as his wife, in case she would return home, he is ordered so to do. But if she did not return home within a month, the payment of the arrears was to be stopped; and on the other hand, if she returned home, and the defendant refused to receive, maintain, and treat her as his wife, the separate maintenance should then continue." *R. L.* and 3 *Atk.* 551.

The author of this work abstains from inserting the different collections of cases, which he had classed for his intended edition of *Vesey* on the various subjects of martial law, from a fear of over-loading the present work: and he trusts the profession will anticipate the like motive in similar cases.

CORY *versus* CORY, July 3, 1747. [20]

(The author could not find any entry in *Reg. Lib.*)

VOL. I. page 19.—Agreement reasonable in itself and to settle family disputes(1) not set aside because the party was intoxicated;(2) no advantage having been taken of it.

NOTES AND OBSERVATIONS.

(1) SEE *per* Lord *Eldon* C. 1 *Ves.* & *Beames*, 30.

(2) As between strangers a Court of Equity will not assist a person who has obtained an agreement from one who was intoxicated, or the other person to get rid of it. Fraud or contrivance form exceptions of course. *Cooke v. Clayworth*, 18 *Ves.* 12.

BUSH *versus* DALWAY, July 7, 1747.

(Reg. Lib. 1746. A. fol. 671.)

Page 19.—S. C. 3 Atk. 530. Baron and feme. Chose in action.

Wife who survived her husband bound, under the circumstances, by his covenant as to a chose in action, which became a vested interest after the execution of the instrument, so that *he might have disposed of it in her life time.*

Construction “or” substituted for “and” upon the plain meaning, from the extensiveness of the context, to carry the subject further.

NOTES AND OBSERVATIONS.

THIS case is more accurately stated in *Vesey* than it is in *Atkyns*. Though the report there affects to set forth the deed, it is done inaccurately. It is not stated in *Atkyns* that the defendant, the *wife*, was a party to the deed, which is there stated merely as a covenant of the *husband*; whereas, it was a regular deed of settlement, whereby the wife herself, in the first place, assigned the sum of 500*l.* due to her by bond. It is true, that the covenant, which came immediately in question in this case, was that only of the intended husband; but it was in the same deed, to which she was a party, as above mentioned. *R. L.*

[21] See the rep. at the top of p. 20. The sentence there as corrected from *R. L.* would run properly thus—“and *received this 2000*l.* which she claimed* absolutely as a chose in action, not called in by the husband, and so surviving to her. The bill was brought by [*the executor of the surviving trustee, and*] her children, who were infants, to have this 2000*l.* placed out for their benefit, subject to her estate for life therein: [*insisting that it became due and payable, and ought to have been paid to the plaintiff, as such executor of the surviving trustee, upon the death of the defendant's father.*”]

N. B. The alterations and additions here are in italics, and the latter also between brackets.

Theobald v. D'fay, mentioned in page 20, is in 9 *Mod.* 101, and cited in the reference there made to 2 *P. W.* 608. See *D. Chandos v. Talbot*, 2 *P. W.* 601. 608. *Bates v. Dandy*, 2 *Atk.* 207. 208. and *Hawkins v. Obyn*, *ibid.* 549.

See top of page 21.—The Court therefore declared, “that, on the construction of the deed, and the event which had happened, the plaintiffs, the children, or such of them as should survive the defendant, would be entitled, &c.” and therefore referred it to the Master to inquire, whether the sum was properly secured; and, if the Master should find that it was placed out on a proper security, then the same was to be continued on such security, subject to further order; but if not, then the same was to be called in and placed out again with the approbation of the Master, &c. *Reg. Lib.*

GODOLPHIN *versus* GODOLPHIN, [22]

July 20, 1747.

(*Reg. Lib.* 1746. *A. fol.* 716. entered “*Godolphin v. Geary.*”)

VOL. I. page 21.—Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, &c. A. may limit an inheritance to effectuate the general intent.

NOTES AND OBSERVATIONS.

In the extract from the bill at p. 21, after the word “*appoint,*” and instead of the words “*and she,*” read as follows, “but not to take place during such time as she, my said executrix, shall live and be unmarried, or be a widow; for my mind is, she shall have and enjoy all the income of my estate, to her own use, during such time of her life as aforesaid, and also, that all persons so descended as aforesaid, being females, shall be by the writing or assurance to be made, debarred of all right, profit, or advantage, whatsoever, during the time they shall be under

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covert, or be in a married state, which they might have otherwise, by virtue hereof, enjoyed. And I declare that my executrix," may, &c. *Reg. Lib.*

Towards the end of the extract, instead of the words "*executing the power*," read "making such writing, settlement, and appointment." *Reg. Lib.*

The case of *King v. Melling*, cited page 22, is in 2 *Lev.* 58, and 1 *Ventr.* 225.

As to what is said, page 23, with respect to its being a ~~case~~ of a power without an interest, see *M. of Antrim v. D. of Bucks*, 1 *Ch. Ca.* 17.

As to the next position, of such an execution
[23] being good, although there were an interest, see 1 *Ves.* 163. 303. 517.

As to the remark which concludes that paragraph, see *Bull v. Vardy*, 1 *Ves. jun.* 270.

The Court declared, "that the settlement or deed of appointment appeared to the Court to be pursuant to the said will, except in the particulars following; that is to say, that the several contingent remainders of the inheritance of the said estate, ought to have been postponed to the respective estates for life, limited by the said deed to the persons therein named, who were then in being; and that there ought to have been a remainder limited, immediately preceding the remainder or reversion in fee, to the heirs of the body of Dame *Maria Dixie*, the testator's mother; and that the remainder or reversion in fee, ought to have been limited to the right heirs of the said *John Dixie*. And it was ordered, that the said settlement be rectified in the several particulars before mentioned, with the approbation of the Master: and that the several contingent remainders of the inheritance, created by the said deed, be postponed to all the limitations thereby made to the persons then in being, for their lives; and immediately after the contingent remainders, that a remainder should be inserted to the heirs of the body of the said Dame *Maria Dixie*, with

a remainder, or reversion in fee, to the right heirs of the testator *John Dixie*; and that a new settlement or conveyance should be made of the said estate accordingly." *Reg. Lib.*

ALLANSON *versus* CLITHEROW, July 23, 1747.

(*Reg. Lib.* 1746, *A. fol.* 711.)

[24]

VOL. I. page 24.—Devise to A. for life, with power for trustees to settle a jointure on his wife; and subject thereto in strict settlement on the issue of such marriage; *but, if A. should die without any issue of his body, then over*—The latter words give him an estate tail by implication.(1) As to estates *pur auter vie*.(2)

NOTES AND OBSERVATIONS.

(1) THE testator made *two* codicils to his will, confirming his will by each expressly, except in the points specified in each. The substance of the one set forth in the report agrees with *Reg. Lib.*

The words used in the will with reference to the fortune contemplated to be brought by the devisee's wife, was not "good," as mentioned in the report, but "suitable;" which is rather material, since the decree proceeds expressly on the word "suitable." Upon this point, the Court declared, "that by the words 'a suitable fortune,' was meant and intended a portion or fortune bearing a reasonable proportion to a jointure of 400*l.* a year rent charge. *Reg. Lib.* 713.

(2) The bill (*inter alia*) insisted, that an estate, *pur auter vie*, belonging to the testator, vested in his executors by virtue of the statute, [29 *Car.* II. c. 3. § 12, and see 14 *Geo.* II. c. 20. § 9.] and ought to be deemed part of his personal estate. The defendant *Cowper* insisted, that it ought to be included in the settlement as part of his real estate. The decree takes no notice of this point. But see *Ripley v. Waterworth*, 7 *Ves.* jun. 425. The bill as to

other points alleged, that the testator had purchased some real estates after the execution of his will. The answer of the defendant *Cowper* submitted how far such lands as were purchased after making his will, and before making the codicils, might be affected by them, or either of them. These points seem much relied on in the pleadings. The decree referred it to the Master to inquire, "whether any lands or real estate were purchased by the the testator after making his last codicil." And if the Master should find that there were, it was declared they were not to be included in the settlement, but descended to the plaintiff as heir at law. *R. L.*

In these questions of estates by implication, the Courts, both of Law and Equity, proceed upon the principle of effectuating a testator's general manifest intention. See most of the cases up to that time collected in *Robinson v. Robinson*, 1 *Burr.* 38. see *ibid.* 50. 51, &c. See *Evans v. Astley*, 3 *Burr.* 1570, *Doe v. Applin*, 4 *T. R.* 82, *Dunn v. Slater*, 5 *T. R.* 335, *Doe v. Halley*, 8 *T. Rep.* 5, *Attorney General v. Sutton*, 1 *P. W.* 754., *Lethicullier v. Tracy*, 3 *Atk.* 784.

BEAUMONT *versus* THORPE, July 25, 1747.

(*Reg Lib.* 1746. *A.* fol. 598.)

VOL. I. page 27.—Settlement after marriage voluntary, and void against creditors.

NOTES AND OBSERVATIONS.

SEE 2 *Vesey* 10 and 11, as to the difference between the 13 *Eliz.* c. 5. which is in favour of creditors, and the 27 *Eliz.* c. 4. which is in favour of purchasers:

[26] from whence it appears, that in respect of the latter, every voluntary conveyance is void against a subsequent one for valuable consideration, though no fraud, and the party not indebted at the time; whereas

a creditor, to take advantage of the 13 *Elizabeth*, must prove that the party was indebted. See also in *Ward v. Shallet*, 2 *Ves.* 18. See in *Russell v. Windham*, 1 *Atk.* 15, and the note there (Mr. Sanders' Ed.) *Walker v. Burrows*, *ibid.* 93. *Lush v. Wilkinson*, 5 *Ves.* 384. *Kidney v. Coussmaker*, 12 *Ves.* 136. *Montague v. Lord Sandwich*, there cited 148. 155, and note (a) 156.

P. 28. It was declared void against the plaintiff, "and all judgment and specialty creditors." *Reg. Lib.*

The infant had his day to show cause against the decree after attaining 21, &c.

"The defendant was to be at liberty to make her election, whether she would insist upon her dower out of the whole estate, in case any part thereof should be sold under the decree, or whether she would take the benefit of the settlement in the rest of the estate that would remain unsold." *Reg. Lib.*

It appears from *Ward v. Shallet*, 2 *Vesey* 16, that a settlement by the husband on his wife and children, upon her agreeing, with her friend's privity, to part with her contingent interest, is good against his creditors: and, likewise, if it is made in consideration of money advanced by a father, or collateral relation, by way of new portion; there being no fraud, or collusion, or such inadequacy as to imply it. See also 2 *Ves.* 308, &c.

BAKER *versus* HART, July 31, 1747. [27]

(*Reg. Lib.* 1746. *A. fol.* 706.)

VOL. I. page 28.—S. C. 3 *Atk.* 542. Legitimacy—Issue—New Trial.

NOTES AND OBSERVATIONS.

As to the nature of commissions of review from sentences of the delegates, see *Matthews v. Warner*, 4 *Ves.* 186. 5 *Ves.* 23, and *ex parte Fearon*, *ibid.* 633.

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There were two issues at law. It appears from *Reg. Lib.* that the Jury not only found the first issue in the affirmative (for the defendant,) but that they negatived the title of the plaintiff's father in the second; contrary to what Mr. *Vesey* reports Lord *Hardwicke* to have said in p. 30. Vide *Reg. Lib.* 707. The true state of circumstances is properly stated 3 *Atk.* 542, and Lord *Hardwicke's* observation is explained *ibid.* 543.

As to the case of *Vernon v. Acherly*, cited p. 29, see the will, &c. with the proceedings in that cause in 2 *Bro. P. C.* 85, octavo edition.

Attorney General v. Montague, cited *ibid.* 2 *Atk.* 378.

As to the granting of new trials after trials at bar, &c. see in *The Queen v. The Bailiffs of Bewdly*, 1 *P. W.* 207, 212, *et seq.* and *Richards v. Symes*, 2 *Atk.* 320.

Stapylton v. Stapylton, *ib. cit.* 1 *Atk.* 2.

Lord *Hardwicke's* observations as to the finding of the jury in the principal case on the second issue, was not (and could not be) as stated in *Vesey's* report, p. [28] 30, (*causa qua supra*;) but it is correctly stated in 3 *Atk.* 543. His Lordship there observes, that the jury did negative the title of the plaintiff's father on the second issue; but that they were induced so to find by their verdict on the first. This exactly shows the nature of Mr. *Vesey's* mistake; whose report was, doubtless, framed from the notes he had taken in Court.

Maxwell v. Montague, cited p. 30, in 11 *Vin. Ab.* 65. Tit. Executors, pl. 9. See *Baker v. Pritchard*, 2 *Atk.* 388.

EARL OF PORTSMOUTH *versus* LADY SUFFOLK and
LORD EFFINGHAM, August 1, 1747.

(*Reg. Lib.* 1746. *A. fol.* 634.)

VOL. I. page 30.—Parties entitled to an estate, confirming a jointress's settlement, are purchasers of her interest in incumbrances

paid off by her fortune, which had been assigned for the better securing her rights under the settlement.

NOTES AND OBSERVATIONS.

SEE page 31. Lady *Suffolk*, therefore, insisted that the assignment of the incumbrances ought to be for her benefit, in case she should not otherwise be completely satisfied in respect of all her claims under her marriage settlement; but said, when the same were secured to her, she was willing to assign the incumbrances for the plaintiff's benefit: she being a purchaser thereof for a valuable consideration without notice of the plaintiff's title.

The decree (see page 32) on the present occasion of the cause coming on upon the equity reserved, directed (*inter alia*) that the plaintiff should execute proper assurances for confirming the defendant's jointure, and the term of 100 years, and that certain of the incumbrances should be assigned to trustees, in the first place, for the like purpose, and afterwards to attend the inheritance; and that the others should be assigned in like manner; in the first place for the first mentioned purpose, and then to indemnify the plaintiff's estate in question in the cause in respect of the defendant's jointure and other provisions, and the plaintiff's confirmation thereof; and an inquiry was directed for these purposes. As to the term of 100 years, the Court declared that the plaintiffs were entitled to be indemnified against the same out of the Earl of *Suffolk's* personal estate, and directed the Master to see a proper fund allotted thereout for that purpose, and placed out in trust in the first place for payment of the said 150*l.* *per annum* to the defendant (who was the Earl's administratrix,) and subject thereto in trust for the persons entitled to the personal estate. *R. L.*

ATTORNEY GENERAL *versus* LLOYD,

August 1, 1747.

(*Reg. Lib.* 1746. *A. fol.* 689.)

VOL. I. page 32.—S. C. 3 Atk. 551. Question as to revocation of a will merely on the words, sent to law. Will made before the mortmain act good, although the testator died after it.(1)

NOTES AND OBSERVATIONS.

(1) SEE also 1 *Ves.* 178, 225.

Mortmain Act, 9 *Geo.* II. *ch.* 26.

Ashburnham v. Kirkhall (cited page 33) is *Ashburnham v. Bradshaw*, 2 *Atk.* 36, and *Barn. Ch.* [30] *Rep.* 6. See also *Willet v. Sandford*, 1 *Ves.* 178 and 186. *Attorney General v. Andrews*, 1 *Ves.* 225. *Attorney General v. Heartwell*, *Amb.* 451, and *Attorney General v. Downing*, *ibid.* 550.

Clifton v. Lady Lombe, (cited p. 33) is in *Amb.* 519.

Page 35. The Court ordered a case to be made for the Judges of the Court of King's Bench, on the testator's will and codicils, and the Mortmain Act, wherein the question was to be, "whether the testator's real estate in Stretton and Shrewsbury were well devised by the second codicil, dated the 17th of March, 1736, to the defendant *M. B.* for life, with remainder over to his first and other sons in tail male, the said *M. B.* having attained his age of 21 years," &c.

The Judges of the Court of K. B. *viz.* Lord Chief Justice Lee, Mr. Justice Wright, Mr. Justice Dennison, and Mr. Justice Foster, by their certificate, dated January 24, 1748, certified their opinion in the affirmative. Whereupon Lord *Hardwicke*, Chancellor, on the 5th of May, 1749, declared accordingly, and directed the trustees to pay to *Millington Buckley* what should be coming upon the balance of an account directed of the rents and profits

of the said estates accrued since the time when he attained
21. *Reg. Lib.* 1749. *A. fol.* 597. 3 *Atk.* 554.

TOWNSEND *versus* LOWFIELD, July 25, 1747.

(*Reg. Lib.* 1746. *B. fol.* 461.) [31]

VOL. I. page 35.—S. C. 3 *Atk.* 536. Account—Liberty to surcharge and falsify.

NOTES AND OBSERVATIONS.

THE bill was filed by the executors of *William Horton* (not *Hall* as above stated) to set aside a deed of assignment, and various securities, and also a stated account, which, it alleged, were fraudulently obtained by *Lowfield* from *Horton*. It stated, that by such deed *Horton* had assigned all his right to his father and mother's personal estate (which was recited to be of a considerable amount) in the hands of his maternal grandfather Sir *William Saunderson* to the defendant in trust, to repay him the consideration therein expressed of 100*l.* lent and advanced for *Horton's* use, and for the security of all such further sums as the defendant should lend and advance for his use afterwards, and after payment of *Horton's* creditors, to pay the residue to him. The bill then stated very particularly the several other circumstances above mentioned, together with various instances of gross oppression and fraud. The defendant (*inter alia*) stated by his answer, that the proposal for the assignment originated with *Horton* alone, without the least hint from the defendant, (1) who was at first averse to it, and that he was induced to accept of the assignment to assist him, in consequence of his complaints of the hardships he was under for [32]

(1) See Lord *Eldon* C's observation as to the first propositions in such cases generally appearing to come from the needy person; in *Evans v. Chesshire*, *postea*, note to Lord *Chesterfield v. Janssen*.

want of money, though he had 10,000*l.* due to him from Sir *William Saunderson*, and in consequence of his promising to give the defendant 500*l.* when he should recover the money; and that *Horton*, and one *Quaile*, a friend of his, solicited the defendant to accept of the assignment, and to bring a bill against Sir *William* for what was due from him. And that the defendant having therefore agreed so to do, *Quaile*, at *Horton's* request, prepared the assignment. The defendant then stated the various advances and transactions relative to the securities, vouchers, and acknowledgments, so as to endeavour to exculpate himself.

The Court directed that the Master should proceed to take the accounts pursuant to the preceding decree, with the addition, that the plaintiff be at liberty before the Master, to falsify the two accounts, or admissions of the defendant's charge, dated the 26th of March and the 3d. of February, 1742. *Reg. Lib.*

Upon the cause coming on again, about a year after the above period, upon the matter of exceptions and costs, the Court did not think fit to give any costs on either side. *Reg. Lib.* 1747, *B. fol.* 445.

Though Courts of Equity will open stated accounts of ever so long standing in a case of clearly apparent fraud, *Vernon v. Vawdry*, 2 *Ath.* 119, yet they will not otherwise, nor open an account settled ten years, &c. before the bill filed, though containing very gross items. The party may, however, be allowed to surcharge and falsify,

but the burthen of proof lies upon him. *Brownell v. Brownell*, 2 *Bro.* 62. As to these points, see *Sewell v. Bridge*, 1 *Ves.* 297; *Earl Pomfret v. Lord Windsor*, 2 *Ves.* 482; *Pitt v. Cholmondely*, *ibid.* 565.

STROUD *versus* DEACON, August 10, 1747.

(Reg. Lib. 1746. B. fol. 449.)

VOL. I. page 37.—General demurrer to a bill for discovery of a settlement, stating a title contradictory to that alleged to be insisted on by the defendant, and charging, that the plaintiff's case would appear as stated, if the settlement were produced. The demurrer over-ruled, being unsupported either by answer or plea to cover the charge.

SHEPHERD *versus* COTTON, Aug. 10, 1747.

(Reg. Lib. 1747. B. fol. 495.)

VOL. I. page 38.—Demurrer allowed to bill for payment of wages of Knights of a Shire: the remedy being at Common Law.

NOTES AND OBSERVATIONS.

THE defendant demurred "as to so much of the bill as prayed, that the plaintiff might be paid his moiety or share of the Knight's fees or wages pretended to be due to him, or that prayed any other relief; and, for cause of demurrer, showed, that the plaintiff had not made such a case by his bill; as would entitle him, in a Court of Equity, to any such relief as was thereby prayed. *R. L.*"

RICHARDS *versus* EVANS, *et e contra*, [34.]

Oct. 26 [and Nov. 27] 1747.

(Reg. Lib. 1747. B. fol. 151.)

VOL. I. page 39.—Modus.—It is not necessary to use the word "modus" in laying it, or a particular day of payment.(1)
A modus may be overturned for rankness, if for a specific thing and clear. If otherwise, it will be sent to law.(2)

NOTES AND OBSERVATIONS.

(1) VIDE also in *Carte v. Ball*, per Lord Hardwicke, 1 Ves. 3, *et ante*.

(2) Vide 2 *Ves.* 514, but more particularly *per* Lord *Eldon* C. in *O'Connor v. Cook*, 6 *Ves.* 671, 674.

Rankness of a modus is only evidence as to the non-immemoriality, and does not of itself form an objection in point of law. See *O'Connor v. Cook*, 6 *Ves.* 665, 672. 8 *Ves.* 536, 539.

As to the distinction noticed by Lord *Hardwicke*, between a modus for tithes of particular things, and a farm-modus, &c. see it enlarged upon by Lord *Eldon* C. in *O'Connor v. Cook*, 6 *Ves.* 672. See various instances cited in that case, in some of which the Court has determined the matter itself, whilst in others it has sent it to a jury.

One of the terriers mentioned in the report page 40, dated March 16, 1683, (signed by the then rector and eight of the principal inhabitants) stated, "that the tithes of the parish were paid in kind, excepting the township of B. (all one gentleman's lands,) for the corn and hay of which he paid 7*l.* yearly to the Rector." The other terrier, dated 5th of June 1730 (all in the then [35] Rector's own hand-writing) stated, "that the then owner of the township paid for his tithe corn and hay 7*l.* *per annum*, and was signed by the Rector, Churchwarden, and 20 inhabitants."

The Rector, by his answer to the cross bill, insisted that "the true sense and meaning of these terriers was, that the 7*l.* was not to be construed as a modus, but as a yearly rent, for that in those very terriers, immediately after the mention of the 7*l.* paid for the corn and hay in B. there were two modusses or prescriptions for two other places in the parish mentioned in express words to be prescriptions."

The original bill was dismissed by consent without costs. And in the cross cause by consent of the Rector's clerk in Court, it was decreed, that the said modus of 7*l.* a year should be established; that the arrears then due should be

paid to the defendant, the Rector; and that the growing payments thereof should be continued to be paid yearly to the said Rector and his successors from time to time, upon Candlemas-day, and no costs were to be paid on either side in the cross cause. *Reg. Lib.*

It appears from *Reg. Lib. ubi supra, fol. 65*, that the cause had stood over from the 26th of October to November the 27th, "for the parties to consider of a proposal." The decree referred to by this note was the result of it, and bears date on the day last mentioned.

BAINES *versus* DIXON, October 31, 1747. [36]

(*Reg. Lib. 1747. B. fol. 112.*)

VOL. I. page 41.—A sale directed on the words "rents and profits" alone, though generally contrary to testator's intent, in aid of a creditor, on the ground of law, that in a will those words meant and passed the land itself.

Another construction, however, as to legacies upon the addition of the words "as the profits," &c. should advance the money.

NOTES AND OBSERVATIONS.

THE present appeal was brought after a re-hearing at the Rolls, in which the order was affirmed. *Reg. Lib. fol. 112, 113.*

Towards the end of the first paragraph, instead of the words "as shall be then living, &c." the statement in *Reg. Lib.* is thus "in equal portions when his son the defendant *M.* should attain the age of 23 years, and not sooner, or as soon after as his said younger children should respectively attain the age of 21 years." No more of the will is stated in *Reg. Lib.*

After varying his Honour's order, by confining the sale to the debts, the following addition to it was directed, *viz.* "That the rents and profits of so much of the testator's real estate as should remain unsold, and the rents and profits of the whole real estate till such sale, after

payment of the interest of the debts, and the allowance for the infant's maintenance, be applied towards payment of the interest of the legacies from a year after the testator's death, and then to sink the principal *pari passu*."

Though a sale of land has in many cases been directed on a devise of "rents and profits," &c. see 1 *Ves.* 42, 171, and *Amb.* 95; it nevertheless seems, that in general, and ordinary instances, the natural meaning of the word "profits" is "annual profits;" and, that the [37] cases which have extended it further, are exceptions out of the general rule, from particular circumstances. See Mr. Cox's note to *Trafford v. Ashton*, 1 *P. W.* 418; *et vide Conyngham v. Conyngham*, 1 *Ves.* 522, and *Reg. Lib.* 1749. *A. fol.* 635, 637, and the notes thereon *postea*.()

ATTORNEY GENERAL *versus* PARKER,(1)

November 4, 1747.

(*Reg. Lib.* 1747. *A. fol.* 317.)

Called there *Attorney General v. Doughty*.

VOL. I. page 43.—**S. C.** 2 *Atk.* 576. Though an information relative to a charitable use will not be dismissed where a clear right is to be settled, yet the information in this case was dismissed with costs, no charitable funds being in question, and no proof entered into as to an alleged right of election, which it sought to establish.(2)

NOTES AND OBSERVATIONS.

(1) SEE *Attorney General v. Forster*, 10 *Ves.* 335.

(2) *Attorney General v. Day*, cited page 43, is also in 1 *Ves.* 218.

Attorney General v. Scott, *ibid.* is likewise *ibid.* 413.

See the above mentioned cases, and *Attorney General v. Smart*, 1 *Ves.* 72, &c. *et vide* 2 *Ves.* 328, and 11 *Ves.* jun. 247.

HODGSON versus RAWSON, Nov. 6, 1747.

VOL. I. page 44. A bequest out of real estate to be paid within 12 months after the death of A. The legatee survives A. but lives only one month after her. The bequest here held not to lapse, and to go to the representative. Vide Mr. Cox's note 2 P. W. 612.

NOTES AND OBSERVATIONS.

Hall v. Terry, cited p. 44, is in 1 *Atk.* 502; but much better reported 8 *Vin. Ab.* 383, Pl. 36. Lord *Thurlow*, C. disapproved of *Hall v. Terry*, in *Godwin v. Munday*, 1 *Bro.* 194: and said that it cannot be reconciled with *Lowther v. Condon*, 2 *Atk.* 127 (cited p. 45.) [38] It seems, however, that Lord *Thurlow's* observations applied only to the report of *Hall v. Terry*, in 1 *Atk.*; although it, perhaps, may extend to that in *Vin. Ab.*; which is, no doubt, accurate. Mr. *Sanders* suggests, in his note to *Hall v. Terry*, that the same remark seems to apply to other cases, and amongst the rest to the principal one of *Hodgson v. Rawson*; and, indeed, comparing the two wills (and taking the report of *Hall v. Terry*, even from *Viner*,) the distinction is not very strong. Nevertheless, it must be observed that Lord *Hardwicke* has relied upon the distinction both in the principal case, and in several others. See in *Tunstall v. Bracken*, *Amb.* 169, &c.

Sherwin v. Collins, cited page 45, is in 3 *Atk.* 319.

Lowther v. Condon, *ibid.* 2 *Atk.* 127, and *Barn. Ch. Rep.* 327,

Van v. Clark, cited p. 46, 1 *Atk.* 510.

The author of this work has a manuscript note relative to the cause of *Manning v. Herbert*, which is shortly reported, *Amb.* 575, from whence it appears, that the circumstance of a clause of entry there was much relied upon. Lord *Hardwicke*, at page 46 of the principal case, states, that as a "particular circumstance" in *Sherwin v. Collins* (reported 3 *Atk.* 319.) The same note also states,

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that "the principal case above, underwent a full consideration therein, and that the case of *Manning v. Herbert*, was determined chiefly upon its authority."

Wellock v. Hammond, cited page 47, *Cro. Eliz.* 204.

[39] *King v. Withers*, *ibid.* 46, 47. *Ca. Temp. Tulb.* 117.

Hutchins v. Foy, *ib.* 47, *Com. Rep.* 716. *S. P. Godwin v. Munday*, 1 *Bro.* 191.

Wilson v. Spencer, cited page 48, is imperfectly stated there. See the report 3 *P. W.* 172.

Lord Hardwicke said, that *Tunstall v. Bracken*, *Amb.* 167, and 1 *Bro.* 124, note, was as near the principal case of *Hodgson v. Rawson*, as one case can be to another. See *Dawson v. Killet*, 1 *Bro.* 119; *Godwin v. Munday*, *ibid.* 191, and the cases cited in each. And see the note to *P. W.* 612. Vide also *Roper* on Legacies, 1 vol. 216 to 249, in which the material cases above referred to, are stated fully and comprehensively.

• *MERITON versus HORNSBY*, Nov. 9, 1747.

VOL. I. page 48.—A master has a right to the earnings of his apprentice, who quits him, but it is to be enforced at law.(1)

NOTES AND OBSERVATIONS.

SEE *Baker v. Dennis*, *Salk.* 68. 6 *Mod.* 69. *S. C. Skinn*, 579.

(1) A Court of Equity will not relieve against the master's legal right to all such earnings. See *Hill v. Allen*, 1 *Ves.* 83.

SIBTHORP versus MOXTON, Nov. 10, 1747.

VOL. I. page 49.—*S. C.* 3 *Atk.* 580. A woman by will, forgives a bond and debt to her son-in-law; and desires her executor to deliver up the bond to be cancelled: this held not to be lapsed, by his dying before the testatrix.

NOTES AND OBSERVATIONS.

Sibley v. Cook, cited p. 49, 3 *Atk.* 572.

Elliot v. Davenport, *ibid.* 1 *P. W.* 86.

See several observations on the principal case, [40] and those approaching it, or distinguishable from it, in *Toplis v. Baker*, 1 *Cox*, *P. W.* 86, note 2, 5th edition.

As to what Lord *Hardwicke* says in the principal case above, p. 50, with regard to the form of a release being wanting, see also *Rider v. Wager*, 2 *P. W.* 331, 332. With respect to Lord *Hardwicke's* observation, p. 50, on *Elliot v. Davenport*, see 1 *P. W.* 85, 86.

LEMAN *versus* NEWNHAM, Nov. 11, 1747.

(*Reg. Lib* 1747. B. fol. 123.)

VOL. I. page 51.—Exoneration. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had covenanted to pay them.

Practice of the Six Clerks' Office. Entry in Bill-book.

NOTES AND OBSERVATIONS.

SEE the doctrine as to the application of the personal estate in case of the real, and the several distinctions as to the land becoming the primary fund, &c. &c. fully stated by Mr. *Cox* in a most able note to *Evelyn v. Evelyn*, 2 *P. W.* 663, in which all the material cases are collected.

In the principal case the Court declared, "that the several mortgages in the pleadings mentioned to have been assigned over to *Lucy Leman*, the plaintiff's testatrix, were still subsisting mortgages; and referred it to the Master to take an account of what was due on them, &c. who, in taking that account, was to distinguish what part of the principal monies secured by the said mortgages, and the several assignments thereof, was borrowed by, and advanced to, and for the use and benefit of any of the ancestors of Sir *William Leman*, [41] and the interest which had accrued due there-

on; and which part of the said principal monies was borrowed by, or advanced to the said Sir *W. L.*, or to and for his proper use and benefit, and the interest which had accrued due thereon. And also declared, that so much of the said principal monies as should appear to have been borrowed by, or advanced to and for the use and benefit of any of the ancestors of the said Sir *W. L.*, together with the interest thereof, was a charge on the lands and premises comprised in such mortgages and assignments, and ought to be raised and paid thereout. And that so much of the said principal monies as should appear to have been borrowed by, or advanced to, the said Sir *W. L.*, or to and for his proper use and benefit, and the interest thereof, ought, in the first place, to be paid, and satisfied out of the personal estate of the said Sir *W. L.*, and in case the said personal estate should not be sufficient to pay the same, then the residue of the said last-mentioned principal monies and interest ought to be raised and paid out of the said mortgaged premises, and decreed the same accordingly: and referred it to the Master to tax all parties their costs of the suit. And an account was directed, in case the plaintiff should not admit assets of Sir *W. L.* come to the hands of *Lucy Leman*, his executrix, or of the plaintiff, her executor, &c. And in case the plaintiff, her executor, should not admit assets to answer the same, then an account was directed as the personal estate of *Lucy Leman* come to his hands, &c. And

upon the defendant *Newnham's* paying unto the
 [42] plaintiff a moiety of what should be found due for such part of the said principal money and interest as should be found to be the debt of any of the ancestors of the said Sir *W. L.*, and also a moiety of such part of the said principal moneys and interest as should be found to be the proper debt of the said Sir *W. L.* so far as the same should not be satisfied out of his personal estate, and also a moiety of the said costs within six months

after the Master's report, the plaintiff was ordered to assign the mortgaged premises to a trustee, to be approved of by the Master, upon trust to attend upon and protect the freehold and inheritance of the said mortgaged premises; but in case the defendant should make default, then the mortgaged premises, or a sufficient part thereof, was to be sold, and the moneys applied as above mentioned, *mutatis mutandis*, and, after payment thereof, if there should be any overplus, one moiety should be paid to the plaintiff, and the other moiety to the defendant. *Reg. Lib.*

Vide page 53, as to the point of practice, where Lord *Hardwicke* expresses it merely as his opinion, that an entry of the bill filed in the Six Clerks' Office, is necessary to ground an attachment for non-appearance to it. The author of this work has to observe, he finds upon inquiry from the Clerks in Court, that such an entry is indispensably necessary to give the party notice; and that an attachment issued without such an entry, would be discharged forthwith. There are two books kept in the Six Clerks' Office. The bills which are filed are entered in one of them; and of these the defendant must take notice. In the other are contained merely [43] the titles of bills which are not filed, but on which some process has issued; and this latter is kept for the sake of defendants, who may prefer costs if they have entered an appearance.

As to Mr. *Vesey's* observation at the top of page 54, see the Act for Amendment of the Law, 4 *Ann*, c. 16, § 22.

WALKER *versus* WALKER, Nov. 17, 1747.

(*Reg. Lib.* 1747. B. fol. 439.)

VOL. I. page 54.—Wife barred of *free-bench* by settlement under agreement before marriage to accept it in lieu of dower, or thirds.

Dower—what shall be a bar of, &c.

NOTES AND OBSERVATIONS.

THE report states the settlor to have purchased the copyhold estates after making the settlement. It appears, however, from *Reg. Lib.* that he purchased and was admitted to two copyhold estates immediately before the execution of the settlement; and that he purchased, and was admitted to the other copyhold estate about a year after its execution.

The statute of *Henry VIII.* referred to by Lord *Hardwicke* in p. 54, is 27 *Hen. VIII. c. 10*, § 6. Vide *Gilb. Ten.* 182. *Vizard v. Langdale*, cited p. 55, is also cited 3 *Atk.* 8.

Lord *Hardwicke* lays down the law in p. 55, that a bare devise of land to a widow, without more, will not operate as a bar of dower. As to some of the cases in support of it, see *Lawrence v. Lawrence. Lemon v. Lemon*, 8 *Vin. Ab.* 366, *Pl.* 45. *Hitchin v. Hitchin*, *Prec. Ch.* 133. *Galton v. Hancock*, 2 *Atk.* 427. *Tinner v.* [44] *Tinner*, 3 *Atk.* 8. *Incedon v. Northcote*, *ibid.* 436. *Ayres v. Willis*, 1 *Ves.* 230. *Charles v. Andrews*, 9 *Mod.* 152. *Broughton v. Errington*, 7 *Bro. P. C.* 461. *Pitt v. Snowden*, 1 *Bro.* 292. *Pearson v. Pearson*, *ibid.* But it is not absolutely requisite that a testator, &c. should expressly declare that the devise, &c. shall be a satisfaction of it. It is sufficient that it appears evidently from circumstances; as, where allowing a double provision would disappoint, or materially affect a will. *Arnold v. Kempstead*, *Amb.* 466, and 1 *Bro.* 292, note S. C. *Villa Reel v. Lord Galway*, *Amb.* 682, and 1 *Bro.* 292, note. *Jones v. Collier*, *Amb.* 730. *Wake v. Wake*, 3 *Bro.* 255. In such cases the widow must make her election.

LORD UXBRIDGE *versus* STAVELAND,
November 25, 1747.

(*Reg. Lib.* 1747. *A. fol.* 339, 340, entered under its proper title, *Earl of Uxbridge v. Statham.*)

VOL. I. page 56.—Demurrers.—One on the ground of forfeiture. Others, as to account of corn ground at other mills, and to a decree that all corn should be ground at plaintiff's mill.

NOTES AND OBSERVATIONS.

THE statement in the report as to the demurrers is not accurate, or satisfactory. The defendant put in four demurrers; the first was on the ground of forfeiture, and was allowed as there stated.

The nature of the second is not mentioned in *Reg. Lib.* but it is stated to have been over-ruled.

The third and fourth were allowed. They were to the relief, for want of equity. The third, applied to an account sought of tolls of corn and [45] grain ground at other mills, and to a decree, praying that the defendant might be obliged to grind all her corn and grain at the plaintiff's mill. The fourth applied to a like prayer in respect of malt. *Reg. Lib.*

In page 56, Lord *Hardwicke* observes, that in order to bind "assigns" by a bill upon a covenant, the bill must expressly allege them to be so bound, or it will be demurrable.

It is so likewise in the case of an heir. See *Crosseing v. Honor*, 1 *Vern.* 180. *Et vide Shep. Touchst.* 376, 378.

VANE *versus* VANE, Nov. 25, 1747.

(*Reg. Lib.* 1747. *B. fol.* 95, 96.)

VOL. I. page 57.—Construction of a trust.—Surplus rents, &c. not included in the term "portion."

NOTES AND OBSERVATIONS.

It was declared, that the plaintiffs had no share or interest in the defendant's share of the surplus in question: and the bill was dismissed without costs. *R. L.*

MADDISON *versus* ANDREW, Nov. 27, 1747.

(*Reg. Lib.* 1747. *B. fol.* 119.)

VOL. I. page 57.—Power.—Illusory appointment. “Legacy given to the children” of S. she then having but one; held for the benefit of all born, or to be born.

Testator on renewal of a lease takes it in the names of his brother and himself, paying the fine and receiving the profits himself. Held not to be assets, but vested in the brother beneficially, upon the ground of intention, though proved but by one witness.

Power to charge a particular sum reserved by owner of the inheritance not executed in his lifetime, held to be executed in substance by his will, charging debts and legacies on all his real and personal estate, though it did not refer to the power. Illusory trust.

NOTES AND OBSERVATIONS.

SEE most of the cases on the execution of powers, and upon illusory appointments collected, and much [46] dwelt on in *Butcher v. Butcher*, 9 *Ves.* 388, 397; and more especially in that case as it came before Lord Eldon C. on appeal, 1 *Ves. & Beames*, 79.

As to what appears in p. 60, 61, relative to circumstances rebutting a resulting trust, see also the case of *Pole v. Pole*, 1 *Ves.* 76, *et post.* ()

MADDOX *versus* MADDOX, Dec. 5, 1747.

(*Reg. Lib.* 1747. *B. fol.* 575, entered “*Maddox v. Betten.*”)

VOL. I. page 61.—Party having notice through his agent, of sufficient to make him inquire as to the title, cannot protect himself by procuring the legal estate.

Attorney, &c. may object to answer as a witness as to confidential communications.

Evidence.—Objections as to the examination of counsel, solicitors, &c. as witnesses.

NOTES AND OBSERVATIONS.

It appears from the statement of the pleadings in *Reg. Lib.* that besides this, and what may be called a provisional execution of the power of charge, by way of mortgage, as noticed in p. 61 of the report, *E. M.* actually devised "the 200*l.* which he had a power to charge, &c. to be divided amongst his younger children." These consisted of the plaintiff and his three sisters. The latter, by their answer to the cross bill, insisted, "that if the 200*l.* should not be applied to disencumber the premises in B, it ought to go according to their father's will, and that thereby they were entitled to several shares thereof."

See as to this, the decree stated from *Reg.* [47]
Lib. post.

Betten, by his answer, insisted he was entitled to the tenement in question, "for that the plaintiff's father in the lifetime of his grandfather, agreed to settle all the real estate that should descend to him at the death of his father, and believed the settlement was made in pursuance thereof, with general words whereby his father intended to perform his said agreement, and that the tenement in B. ought to have been included."

By the decree it was (*inter alia*) declared, "that the premises in B. were not comprised in the settlement, but passed to the plaintiff by the will of his father, subject to the said mortgage for 200*l.* and interest thereon, together with his power of charging 200*l.* on the settled estate; and that the burthen of the mortgage ought to be borne in equal proportions, rateably between the premises in B. and the sum of 200*l.* chargeable on the settled estate. An account was directed as to what was due on the mortgage; and the plaintiff was to be at liberty to redeem. In case he did so, the Master was to settle the proportions of what should be found due for the 200*l.* and interest, which ought to be respectively borne by the premises in B. and the 200*l.* charged on the settled estate by virtue of the power; re-

gard being had to the difference of value between the premises in B. and the 200*l.*; and regard also being had to the money that should have been applied out of the rents and profits of those premises towards dis-
 [48] charging, or sinking, the 200*l.* or the interest thereof; and such sum as the Master should settle to be the proportion of what should be found due for the 200*l.* and interest, which ought to be borne by the settled estate, by reason of the power, together with such further sum as should make up the principal money of such proportion, to the amount of 200*l.* with interest for such further sum, from the death of *Edward Maddox* the father, was directed to be raised by mortgage or sale of the settled estate; which, when raised, was to be equally divided between, and paid to the plaintiff and his sisters, share and share alike." *Reg. Lib.*

As to the examination of a counsel, solicitor, or attorney, as a witness, see *Gwillim, Bac. Ab.* 2 vol. 579, 580. Mr. *Gwillim* makes there an observation of some weight on the passage in the report on this point, inasmuch as it would seem from thence, that the right to object were the privilege of the attorney, &c.; whereas the obligation to silence is for the sake of the client; and he then proceeds to notice, that a Court of Law will itself stop the witness whenever he discovers an anxiety to reveal the confidential communication of his client. 4 *T. R.* 759; and that the Courts of Equity will suppress such depositions. *Sandford v. Remington*, 2 *Ves.* jun. 189.

[49] *BANKS versus DENSHIRE*, Dec. 9, 1747.

(*Reg. Lib.* 1747. *A.* fol. 306.)

VOL. I. page 63.—Copyholds unsurrendered by mistake; surrender supplied in favour of a younger child.

NOTES AND OBSERVATIONS.

THE devise was not to the plaintiff *Banks*, &c. as stated in the report, but was to the testator's daughter, who married *Banks*, and the heirs of her body. *Reg. Lib.*

After so much of the will as appears in the report, *Reg. Lib.* states, "he directed that, as well the said freehold, as the said copyhold estate, should be subject to an annuity of 50*l.* to the defendant his son [who was also his heir] for life."

The question was, whether the want of a surrender should be supplied in favour of the daughter as a younger child, &c. *Reg. Lib.*

The case mentioned in the report as of the King's Head Inn in Turnham Green, is *Gascoigne v. Barker*, 3 *Atk.* 8. *Allen v. Poulton*, there mentioned, is 1 *Ves.* 121; but it is observable this case must have been added by the reporter subsequently, as it was not decided until very nearly a year after the principal case.

In the principal case, the Court declared, "that the copyhold tenement was comprised in the devise, &c. to the testator's daughter, the plaintiff *Mary*:" and decreed accordingly. *Reg. Lib.*

LE NEVE *versus* LE NEVE, Dec. 9, 1747. [50]

(*Reg. Lib.* 1747. *B. fol.* 109.)

VOL. I. page 64.—S. C. 3 *Atk.* 646. and *Amb.* 436. Notice to an Attorney of a prior conveyance unregistered will postpone a conveyance for the benefit of the principal which has been registered. Notice to agent is notice to a party. (1)

No decree on one witness only, against a denial by answer equally positive, uninfluenced by other circumstances.

Difference between the Registry Acts for England and Ireland.

NOTES AND OBSERVATIONS.

(1) THE bill stated (*inter alia*) that *Edward Le Neve* neglected to register the articles, &c. which ought to have

been done, in order to a complete execution of the articles, and to prevent the premises being incumbered; and that he, taking advantage of his own neglect in not registering the articles, &c. made and registered the several mortgages, and the settlement, on his second wife, charging notice, &c. as in the report. It prayed, That the defendant might deliver up the pretended marriage articles and settlement, and all other writings, &c. relating to the title of the said premises; or in case the said conveyance should appear to have been made upon a good and valuable consideration, and without such notice as was charged in the bill, then that the defendant, the father, might settle lands of equal value to the said premises to the like uses as were limited by the original articles, or make the plaintiffs such other compensation as the Court should direct, and that he might be obliged to register the said articles, and the settlement, &c. in pursuance of, and to the uses of, the articles, and according to the statute. *Reg. Lib.*

(2) *Jennings v. Moor*, cited p. 65, from 2 *Vern.* 609, is S. C. on appeal, *Dom. Proc.* with *Blenkarne v.*
 [51] *Jennens*, 2 *Bro. P. C.* 278, octavo edit. See also *Maddox v. Maddox*, 1 *Ves.* 62. 2 *Ves.* 370, &c.

Such notice must, however, be in the same transaction. Vide *Fitzgerald v. Falconbury*, *Fitzgib.* 207. *Lowther v. Carlton*, 2 *Atk.* 242. *Warrick v. Warrick*, 3 *Atk.* 294. *Worsley v. Earl of Scarborough*, *ibid.* 392. *Steed v. Whitaker*, *Barn. Ch.* 220.

Though it is generally true that a point supported only by one witness cannot be maintained against a positive denial in an answer. *Hobbs v. Norton*, 1 *Vern.* 136. *Alam v. Jourdan*, *ibid.* 161; yet it is so merely where the denial is as express and positive as the testimony, and there are no corroborative circumstances. *Walton v. Hobbs*, 2 *Atk.* 19. *Janson v. Rany*, *ibid.* 140. *Only v. Walker*, 3 *Atk.* 407. *Arnot v. Biscoe*, 1 *Ves.* 97. Vide also, 1

Bro. 52. 6 *Ves.* 40. *ibid.* 177, 183, 184. 9 *Ves.* 275, &c. 12 *Ves.* 78, 80, &c.

Lord Forbes v. Denniston, cited p. 67, is S. C. with 4 *Bro. P. C.* 189, octavo edit. and 13 *Vin. Ab.* 550, and 19 *Vin. Ab.* 514.

There is a material difference between the Register Act for Ireland and those in England. By the Irish Act, 6 *Ann*, c. 2. an absolute priority is expressly given to the instruments first registered. Vide *Scho. & Lefr. Rep.* 98. *Et ibid.* 159, 160. The registry of a deed in Ireland is not, of itself, notice, *ibid.* 90, 157.

Blades v. Blades, cited p. 68, is in 1 *Eq. Ab.* 358, pl. 2.

Chivals v. Niccols, cited *ib.* is 1 *Stra.* 664.

“*Fraus nemini patrocinarī debet*,” (page 68.) Vide *Co. 3 Rep.* 178, b.

In addition to the cases cited, or referred to, [52] on the Registry act, vide *Wrighton v. Hudson*, 2 *Eq. Ab.* 609, before Sir Joseph Jekyll, *Bacchus v. Bacchus*, cited *Amb.* 680. 2 *Atk.* 275. *Amb.* 624. *ibid.* 678. *Appendix to Sch. & Lefr. Rep.* 467. 3 *Ves.* 478. 4 *Ves.* 389. 9 *Ves.* 407.

SPERLING *versus* TOLL.

(*Reg. Lib.* 1747. B. fol. 121.)

VOL. I. page 70.—Money to be laid out in land considered as land. Executory trust for three for their lives, as tenants in common; if any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over. Two of them dying in testatrix's lifetime—Held their shares lapsed, and went over.

NOTES AND OBSERVATIONS.

THE Court declared “that two-thirds of one moiety of the lands to be purchased with the surplus of the testatrix's estate, which, by her will, were limited after the death of

W. T. her brother, to *W.* and *John T.* her nephews, who died in the lifetime of their father, without issue, belonged to the following persons and their heirs, viz. seven tenth parts thereof unto *A. W.*, *M. W.*, *S. T.*, *E. W.*, *J. W.*, *A. W.*, and *E. W.*, and their heirs, as tenants in common; and that the remaining three-tenth parts of the said shares of such moiety belonged to the defendant *W. T.* the infant, and his heirs, as he was the heir at law of *W. T.* the elder, who was heir at law of the said testatrix, the other devisees thereof having died in her lifetime; and the Master was to see the same settled accordingly: and the remaining one-third of such moiety was to be settled upon the defendant *W. T.* the infant, as directed by the will. *Reg. Lib.*

[53] ATTORNEY GENERAL *versus* SMART,
March 4, 1747-8.

VOL. I. page 72.—Where a decree for the establishment of a charity should be made, an information will not be dismissed because it prays wrong relief;(1) but the Court of Chancery will not act in many cases,(2) and has no jurisdiction in many others, as foundations under a charter, &c.(3)

NOTES AND OBSERVATIONS.

- (1) **VIDE 2 *Ves.* 328, and 11 *Ves.* 241, 247, 365, 367, 372.**

- (2) Vide *Attorney General v. Parke*, 1 Ves. 43, et antea [37].

- (3) See *Attorney General v. Middleton*, 2 Ves. 327. *Attorney General v. Talbot*, 1 Ves. 72, et post. 15 Ves. 305, &c. 17 Ves. 491, 498, and 1 Ves. & Beames, 134.

The late act for the regulation of Charities upon a petition instead of an information, is the 52 *Geo. III. c. 101.*

That act does not affect third persons, such as parties claiming under a lease, &c. sought to be set aside, &c. *Burnham Charity Case*, Lincoln's Inn Hall, Dec. 7, 1814,

&c. So that in such cases the relief must be sought by information.

There must always be some relators before the Court to answer the event of costs. See *Prec. Chan.* 42.

STEPHENS *versus* TRUEMAN, March 5, 1747-8.

(*Reg. Lib.* 1747. *B.* fol. 257.)

VOL. I. page 73.—In marriage articles and settlements, on good and valuable consideration, it will run through all the limitations, so as to enable the remotest remainder man to sue for a specific performance, &c.

Costs paid to disinherited heir, raising a fair question, and avoiding useless expense.

NOTES AND OBSERVATIONS.

THE case of *Vernon v. Vernon*, cited page 73, was affirmed in *Dom. Proc.* Vide 1 *B'o. P. C.* 267, octavo edition.

Fagg v. Nash, cited *ibid.* is S. C. with *Goring v. Nash*, 3 *Atk.* 186. [54]

See those cases also, 1 *Ves.* 216. Mr. *Sanders's* note to *Goring v. Nash*, 3 *Atk.* 188, and *Nairne v. Prowse*, 6 *Ves.* 752.

The very ground of the decisions is that stated by Lord *Hardwicke* in the principal case, p. 74, namely, "that agreements are entire, and the several branches might have been in view."

Lord *Hale* lays down the doctrine as prevailing accordingly in the cases of actual settlements in *Fursaker v. Robinson*, as it is reported in *Hardw.* 395; which case, as reported in *Prec. Chan.* 475, had been cited against the claim in the principal case.

As to the subject of costs, at the end of the report, page 74, the decree expresses it thus—"The defendant not having put the plaintiff to the expense of any examination, nor to any unreasonable expense in the cause, it is order-

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ed, that the defendant, upon executing the said conveyances, be paid his costs of this suit, to be taxed." *R. L.*

● POLE *versus* POLE, March 8, 1747-8.

(*Reg. Lib.* 1747. *B. fol.* 305.)

VOL. I. page 76.—A father having provided for his eldest son, but not for the rest, takes a security for the proceeds of an estate sold in the name of himself and eldest son—Held a trust for the father's personal representatives.

NOTES AND OBSERVATIONS.

THE eldest son's cross bill was dismissed, with costs. In the original suit it was declared, "that he ought to be considered as a trustee in the mortgage in question, for his father; and he was directed to pay the costs of that suit, so far as the same related to the question concerning the right to the mortgage money." *Reg. Lib.*

It should seem that in these instances the father, or his representatives, would have the right *prima facie*; subject to be rebutted upon circumstantial evidence. See in *Maddison v. Andrew*, 1 *Ves.* 60, 61. Vide also, *Stileman v. Ashdown*, 2 *Atk.* 477, &c. &c. and *Mr. Sanders's* note; also *Scroop v. Scroop*, 1 *Ch. Ca.* 37.

HILL *versus* BALLARD, March, 9, 1747-8.

(*Reg. Lib.* 1747. *A. fol.* 292.)

VOL. I. page 77.—On the marriage of A. his sister advances him 600*l.* to make a present to his wife, and A. procures his father to give her a bond for the amount payable at a month after his death. A. pays his sister interest during his father's lifetime, and for the month afterwards. On a bill by the sister against the representatives of her father and her brother.—Held a debt on the estate of the father, not to be indemnified by A. And the plaintiff was also decreed her costs out of her father's es-

tate. (1) *Aliter*, if such a transaction had been between strangers.

Accounts, memoranda, &c. of the father read in favour of his representatives, although objected to by the other defendant as likely to affect him. How answer of one defendant may affect another defendant. (2)

As to securities, &c. in fraud of marriage agreements. (3)

NOTES AND OBSERVATIONS.

(1) THE report is erroneous at page 78, in stating that no costs were decreed against the father's representatives. It appears from the Registrar's Book that the latter were ordered to pay the plaintiff her costs; and that a cross bill by them was dismissed, with costs as to the plaintiff, and without costs as to the brother.

The original bill was filed by the sister against the representatives of the father Sir *Isaac Shard*, and her brother. It appears from the pleadings (*inter alia*) that the intended wife of the latter defendant, being entitled to a considerable fortune, the same, and a considerable real estate proceeding from the defendant's father, were settled on the marriage; and that the defendant, wishing to make a suitable present to his intended wife, [56] requested his father to advance him 600*l.* for the purpose; who refused to advance the money; but agreed, on its being advanced by his daughter, to secure its repayment to her after his death; which being done, he executed an obligation, whereby "he bound himself, his heirs, &c. to pay to his said daughter, her heirs, &c. the sum of 600*l.* of lawful money, at one month after his decease." It also appears that the plaintiff afterwards advanced a further sum of 200*l.* in like manner, upon which Sir *Isaac* added the following words at the bottom of the instrument, *viz.* "I do, upon a further consideration, promise to pay 200*l.* more, to make the above 600*l.* 800*l.* to be paid at the aforesaid time, without interest." The son paid interest for these sums during his father's lifetime, and for the month afterwards. The father's representa-

tives insisted (*inter alia*) upon the circumstance of Sir *Isaac* having actually settled all he had engaged to do by the treaty preceding the marriage, and that no consideration was stated in the instrument. Their answer also contained much irrelevant matter. They also filed a cross bill, which was dismissed with costs, as above, &c. In the original cause the two sums were decreed to be paid the plaintiff by Sir *Isaac's* representatives, with interest from the end of one month after his death, and her costs. *R. L.*

(2) In illustration of what Lord *Hardwicke* observes in the report, as to admissions in the answer of one defendant having in their consequences affected other defendants, the editor has to notice, that Lord *Eldon* C. directed an answer of that nature to be read accordingly, in *Alsager v. Rowley*, Lincoln's Inn Hall, March 12, 1802; observing, "that although an answer cannot be read as positive evidence against a co-defendant, it may yet be used for the purpose of showing a contradiction in the different statements, or a disagreement in accounts, so as to lay a ground for inquiry." Auth. MS. note. *Alsager v. Rowley*, is in 6 *Ves.* 748, but this point is unreported.

(3) As to the case mentioned by Lord *Hardwicke*, of securities taken, or private understandings, in fraud of marriage agreements, see *Pitcairne v. Ogbourne*, 2 *Ves.* 375, and *Troughton v. Troughton*, 1 *Ves.* 86, *et post.* 64.

ATTORNEY GENERAL *versus* TALBOT,
March 25, 1747-8.

(*Reg. Lib.* 1747. *A.* fol. 620.)

VOL. I. page 78.—S. C. 3 Atk. 662. Chancery has no jurisdiction to interfere with the election of Members of Colleges, or misapplication of their funds, &c. where the appointment of a general Visitor can be inferred. (1)

Plea that the Chancellor of the University was Visitor of Clare Hall to the whole relief and discovery of such an information, supported. No precise words requisite to constitute a general Visitor. (2)

NOTES AND OBSERVATIONS.

(1) *VIDE Attorney General v. Smart*, 1 *Ves.* 72, *et ante* [53,] and *Green v. Rutherford*, 1 *Ves.* 462, 472, &c. Also the cases referred to in *Attorney General v. Dixie*, 13 *Ves.* 519. *Kirkby v. Ravensworth Hospital*, 15 *Ves.* 305, &c. *Attorney General v. E. of Clarendon*, 17 *Ves.* 491, 498, &c. *Case of Berkhamstead School*, 2 *Ves. & Beames*, 134, &c.

(2) The plea was in the first place to the whole of the relief, and after stating at length the Statutes of the University, it averred "that the said statutes [58] were all the statutes which any way related to the constitution of a visitor of the said college, or hall; nor was there in any charter, deed, evidence, paper, or writing, to the defendant's belief, any thing which related to the appointment of a visitor of the said college or hall [save] as aforesaid. And defendant was advised, and insisted that the said Chancellors of the University ever since had been visitors of the said college or hall; and that the most noble Charles Duke of Somerset then was the Chancellor of the said University of Cambridge, and also then was the visitor of the said college or hall, and of the Master, Fellows, and Scholars of the said college or hall; and that the said Chancellor for the time being, his deputy, or Vice Chancellor for the time being, had, with the advice and consent of two Doctors (if any such there were) or otherwise of two Masters of Arts, one a Regent, and the other a Non-regent Master, to be assigned by the University, as assessors or assistants assumed to him for all the time aforesaid, as visitor of the said college or hall, upon appeal to him made for that purpose, had heard, adjudged, and determined, and of right ought to hear, adjudge, and

determine, all disputes, complaints, and controversies, of and concerning the election and admission of any person into the place of one of the fellows or scholars of the said college, and of and concerning all other matters and things relating to the rules and good government of the said col-

lege ; and that such complaints, disputes, and
[59] controversies, had not been, and ought not to be heard, adjudged, or determined, before any

other court or judicature, or in any other manner whatsoever; and that at the time of the election of the said defendant into the place of one of the fellows of the said college or hall, and long before, and ever since, the said most noble *Charles*, Duke of Somerset was, and he then was, the chancellor and visitor of the said college. And that the relator R.M. had not appealed to the said chancellor, as visitor of the said college or hall, nor elsewhere, to hear and determine the right of election and admission of him the said defendant into the place of one of the fellows of the said college or hall, as he might and ought to have done ; and that the said chancellor had power and authority to compel him, the said defendant, to make a full answer upon oath to all such matters as should be complained of against him touching the election or admission of fellows into the said college or hall, and all other matters relating thereto, and to enforce a production of all statute books, papers, and writings whatsoever, in the said defendant's custody or power, relating to any controversy touching the election or admission of any fellows into the said college or hall, and particularly relating to the election of him the said defendant, or the said relator R. M. into the place of one of the fellows of the said college or hall. And as to so much of the said information as prayed any discovery of the several matters therein severally mentioned, set forth, or alleged, save and except such

[60] part thereof as charged the defendant with any unjust combination, or confederacy, the defen-

dant by further plea, insisted on the several matters before pleaded and set forth." *Reg. Lib.*

(3) See 15 *Ves.* 309, 314, &c.

ATTORNEY GENERAL *versus* WYCLIFFE,
January 26, 1747-8.

(*Reg. Lib.* 1747. *A. fol.* 363.)

VOL. I. page 80.—Nomination of a master to a charity school, not subject to the general rules of lapse, as in cases of presentation to livings.

OWEN *versus* DAVIES, *February 1, 1747-8.*

(*Reg. Lib.* 1747. *B. fol.* 451.)

VOL. I. page 82.—Specific performance of agreement against one who afterwards became a lunatic.(1)

NOTES AND OBSERVATIONS.

(1) IT seems to have been the practice in such cases for the Court to decree the lunatic to execute when he recovered his understanding, the party to hold and enjoy in the mean time. *Pegge v. Skinner*, *Ch.* May 22, 1784, MSS. But now, by statute 43, *Geo. III. ch.* 75, the Lord Chancellor may order the freehold and leasehold estates of the lunatic to be sold, or charged by way of mortgage, or otherwise, for payment of creditors, and performance of contracts, &c. and the costs and charges thereof; and may direct the committees to execute conveyances, and to procure admittances to, and make surrenders of copyholds, &c. It is, however, provided by the 6th sect. that the act is not to subject such estates to debts [61] or demands, otherwise than as the same were then liable unto by due course of law; but only to authorize the Lord Chancellor to make orders in the above cases, when the same should be deemed for the lunatic's benefit.

There must be some mistake in the report at bottom of page 82, where it is supposed that the instrument had not been signed by the plaintiff or his agent: for the bill stated, that the original agreement was signed by the plaintiff's agent as well as by the defendant, and the agreement as stated in the bill, is admitted by the answer of the committee. The party, however, who became afterwards a lunatic, confirmed the original agreement by a writing, which was signed only by him. Both the original agreement and the confirmation were proved in the cause. *Reg. Lib.*

In the second clause of Lord *Hardwicke's* judgment, his Lordship properly reprobates the agreement made amongst the lunatic's next of kin, as to the disposal of the purchase money. It may be right to observe, that the Lord Chancellor, in administering a lunatic's funds, never adverts to any contingent interests of the next of kin; but, on the contrary, will apply the whole if it contributes to the lunatic's comfort or convenience; taking care, however, his creditors are not prejudiced. *Dormer's Case*, 2 P. W. 262, 265. *Ex parte Chumley*, 1 Ves. jun. 296. *Oxendon v. Lord Compton*, 2 Ves. jun. 72. *Ex parte Baker*, 6 Ves. 8.

And even as to creditors, the Lord Chancellor
[62] will not make an order, which will have the effect of reducing the lunatic to a state of absolute want. *Ex parte Dikes*, 8 Ves. 79.

For a few other points as to alterations of the law by statutes relative to lunatics, it may be observed, that by the 4 Geo. II. c. 10. Lunatics, &c, or their committees, were enabled to assign over their trusts and mortgages, and might be ordered to make conveyance, &c. by direction of the Lord Chancellor.

By 29 Geo. II. c. 31. Lunatics, their guardians, &c. may, by order of the Courts of Equity, surrender leases, and accept renewals.

By the 36 *Geo. III. c. 90. § 3.* Stock in the name of lunatics, or their committees, may be ordered in certain cases to be transferred.

HILL versus ALLEN, February 3, 1747-8.

(*Reg. Lib. 1747. A. fol. 263.*)

VOL. I. page 83.—The Court will not relieve against a master's legal right to all the earnings of his apprentice, who quitted his service during his indentures.(1)

NOTES AND OBSERVATIONS.

(1) *SEE Meriton v. Hornby, 1 Ves. 48, et ante.*

DAVIES versus BAILY, February 8, 1747-8.

(*Reg Lib. 1747. A. fol. 266.*)

VOL. I. page 84.—Bequest of residue to trustees, the widow to have the interest for life; and after her death, the residue to be divided amongst such of testator's relations as would have been entitled under the statute of distributions if he had died intestate. The widow's representatives excluded from any share.(1)

NOTES AND OBSERVATIONS.

THE words of the limitation were "to such of his relations as would be entitled thereto, by the laws in force concerning the distribution of intestate's estates, in case he had died intestate, to be divided as the said laws direct."

(1) *Garrick v. Lord Camden, S. P. 14 Ves. [63] 372.*

Vide *Green v. Howard, 1 Bro. 33.* Et vide, *Worseley v. Johnson, 3 Atk. 758.* So likewise, where a person gives amongst "his relations," this does not include those by affinity, such as brothers in law, &c. *Maitland v. Adair, 3 Ves. 231.* If, however, an intention to include them can be clearly collected from the will, it will pre-

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vail; for the statute is substituted only where the intention cannot be made out. *Greenwood v. Greenwood*, 1 Bro. 30, 32, note.

MILLER versus FAURE, February 10, 1747-8.

(*Reg. Lib.* 1747. *B. fol.* 254.)

VOL. I. page 85.—Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse.

MILLAR versus TURNER, Hil. T. Feb. 11, 1747-8.

(*Reg. Lib.* 1747. *B. fol.* 532.)

VOL. I. page 85.—A posthumous child within a provision in marriage articles for such children of the marriage as should be living at the death of the father or mother.

NOTES AND OBSERVATIONS.

A POSTHUMOUS child may be the subject of warranty, *Co. Litt.* 390, a. So of murder, 3 *Inst.* 50, 51. It may take under the statute of distribution, &c. as living at the intestate's death. *Wallis v. Hodson*, 2 *Atk.* 114, and *Barn. Ch.* 271. It may obtain an injunction to stay waste, *Musgrave v. Parry*, 2 *Vern.* 710. It will prevent a remainder taking effect, which depended upon

[64] the death of the father, without leaving issue.

Burdet v. Hopegood, 1 *P. W.* 487. A limitation to it for life, with remainder over in tail in strict settlement, will be good, *Long v. Blackall*, 3 *Ves. jun.* 486. 7 *T. R.* 700. S. C. and see 4 *Ves.* 322.

As to the principal point, it was determined in *Hale v. Hale*, *Prec. Ch.* 50, that such a child was entitled to the benefit of a charge for raising portions for children living at the death of the testator. And it seems that the question, whether they could take a share in a fund bequeathed to children under a general description "of children

living at the testator's death," was not finally settled in the affirmative until the case of *Clarke v. Blake*, 2 *H. B. Rep.* 399, 2 *Bro.* 320, and 2 *Ves. jun.* 673. S. C.

TROUGHTON *versus* TROUGHTON,

February 23, 1747-8.

(*Reg. Lib.* 1747; *B. fol.* 352.)

VOL. I. page 86.—S. C. 3 *Atk.* 656. quod vide. Settled estate disencumbered of a charge in fraud of a marriage agreement.

NOTES AND OBSERVATIONS.

THIS case is fully stated, and much better than reported in *Atk.*

The statement in 1 *Ves.* 86, is not correct. It appears from *Reg. Lib.* and is so stated in *Atk.* that the obligation to re-convey part of the estate, or pay 300*l.* &c. was by a separate instrument, executed on the same day as the settlement; being a joint bond from the husband and wife. See the case as reported in 3 *Atk.* 656, with those cited in the argument, and the decree, &c.

SHISH *versus* FOSTER, et e contra, [65]

February 26, 1747-8.

(*Reg. Lib.* 1747. *B. fol.* 241.)

VOL. I. page 88.—A stated account and release being set aside, relief not given to the defendant on a cross bill for another independent matter, until he should fully account in the original suit.

NOTES AND OBSERVATIONS.

THE defendant *Foster* was ordered to pay the plaintiff *Shish* his costs of the two suits so far as they related to the accounts of the plaintiff's father's personal estate, and the plaintiff's real estate, up to the hearing: the Court reserv-

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ing the consideration of subsequent costs, and the whole costs of the cross cause, so far as they related to the copyhold estate, until after the Master's report. *Reg. Lib.*

TILBURGH *versus* BARBUT, March 2, 1747-8.

VOL. I. page 89.—S. C. 3 Atk. 617. Devise to A. and his heirs; and if he died without heirs, remainder to B. The devise being clearly of a fee, the remainder is void.

NOTES AND OBSERVATIONS.

VIDE *Fearne Ex. Dev.* 4th 'edit. 116, *et seq.* Also 179, 180, &c. And see Mr. *Sanders's* note to the principal case in 3 *Atk.*

MENDES *versus* MENDES, March 11, 1747-8.

(*Reg. Lib.* 1747. B. fol. 200.)

VOL. I. page 89.—Liberal construction in favour of the vesting of portions. (1) Survivorship as between the children referred to their not attaining 21, or marriage, though no express words to that effect; there being a preceding clause as to other children, where the like words were used.

NOTES AND OBSERVATIONS.

(1) SEE *Hawes v. Hawes*, 1 *Ves.* 13, *et antea*, (15) and *Stones v. Heartly*, 1 *Ves.* 165, *post.*

[66] **BENSON *versus* DEAN and CHAPTER of YORK,**
February 29, 1747-8.

(*Reg. Lib.* 1747. A. fol. 654.)

VOL. I. page 91.—Costs.

NOTES AND OBSERVATIONS.

THE Court (*inter alia*) ordered, that if the defendants "should put the plaintiff to any further trouble in carry-

ing the decree into execution, the latter should be at liberty to apply to the Court for his costs." *R. L.*

REVEL *versus* WATKINSON, June 11, 1748.

VOL. I. page 93.—*S. P. Tracy v. Lady Hereford*, 2 Bro. 133. Tenant for life must keep down the interest of incumbrances, although the whole of the rents and profits are exhausted by it. The Court, however, will direct a reasonable maintenance for him out of the profits, if otherwise unprovided for.

NOTES AND OBSERVATIONS.

SEE *Hungerford v. Hungerford*, *Gilb. Rep.* 69. But it is otherwise in the case of tenant in tail, *Amesbury v. Brown*, 1 *Ves.* 477, 480. There is, however, a distinction where the tenant in tail is an infant, and his guardian or trustee is in possession of the profits of the estate; inasmuch as, in the first place, the infant cannot bar the remainder, like other persons; and, in the next, the act of the guardian shall not alter his property, or that of those coming after him. *Sarjeson v. Cruise*, cited by Lord *Hardwicke*, 1 *Ves.* 480, and reported 2 *Atk.* 412. Vide *ibid.* 414, note, and 416, and the notes. *Chaplin v. Chaplin* (as to this point) seems over-ruled by *Sarjeson v. Cruise*. Nevertheless as to this, see 1 *Ves.* 480. *Tracy v. Lady Hereford*, 2 Bro. 128, is *S. P.* but it is rather curious that the principal case was not adverted to at either of the hearings. *Ex inform.* Et vide the report.

There is an inaccuracy at the top of page 94, [67] of the report, where Lord *Hardwicke* is reported to state as law, that "the words, 'rents and profits,' used generally, without more, imply a power to sell;" referring to *Ivy and Gilbert*, 2 *P. W.* 13. The report in the latter case does not warrant such a conclusion. On the contrary, it states that "the natural meaning of the words is by 'yearly profits;' and that the word 'profits' had in some particular instances been extended to any profits,

&c. to prevent inconvenience." In corroboration of this doctrine, see the cases referred to by Mr. Coz's note to *Trafford v. Ashton*, 1 P. W. 418, and the note to *Conyngham v. Conyngham*, *post*.

ARNOTT *versus* BISCOE, June 13, 1748.

(*Reg. Lib.* 1747. *A. fol.* 528.)

VOL. I. page 95.—Attorney on sale of an estate not disclosing to the buyer an incumbrance, and leading him to suppose the title would be a good one, held liable to make satisfaction in default of the vendor. (1)

Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive. (2)

NOTES AND OBSERVATIONS.

(1) THE bill stated, that *Biscoe* in the first place, had (*inter alia*) assured the plaintiff that "the premises were free from incumbrances." And in another part charged that upon the vendor's wishing for part of the purchase money beforehand, *Biscoe*, to induce its advance, assured the plaintiff that "the premises were not subject to any incumbrances, or that such incumbrances would soon be discharged." *Biscoe's* answer stated, that (in respect of the first meeting between the parties) "he did then, and at such time, as he believes, acquaint the plaintiff [68] of the incumbrance, &c." and afterwards, that "he believed he did the like in the presence and hearing of the plaintiff's own attorney." The other material parts of the bill he denied in terms more positive.

The issue was also to ascertain whether *Biscoe* gave notice to the plaintiff of a decree of foreclosure which had been made in that Court." *Reg. Lib.*

(2) See the note to *Le Neve v. Le Neve*, *antea*, 50.

LE FARRANT *versus* SPENCER, June 14, 1748.

(*Reg. Lib. 1747. A. fol. 680.*)

VOL. I. page 97.—Bequest by an E. I. captain of all household furniture,(1) linen, plate, and apparel, includes only what is for domestic use, and not any articles for trade or merchandize. Construction as to the words “or” and “and.” Medals(2) when to pass by a bequest of money, &c.

NOTES AND OBSERVATIONS.

THIS case is entered under the title of “*Farrant v. Spencer.*”

(1) See *Hele v. Gilbert*, 2 *Ves.* 430.

(2) See *Bridgman v. Dove*, 3 *Atk.* 201.

The case of *D. Beaufort v. Lord Dundonald*, 2 *Vern.* 739, is cited in the report. Lord *Hardwicke* said in *Bridgman v. Dove*, that he laid very little stress on it, 3 *Atk.* 202.

SWYNFEN *versus* SCAWEN, June 18 and 22, 1748.

(*Reg. Lib. 1747. B. fol. 393.*)

VOL. I. page 99.—A debt by covenant in marriage articles, and no mention of interest. The Court would not reduce it lower than 5 per cent. The like interest allowed also upon a legacy for mourning.

NOTES AND OBSERVATIONS.

THE cause was afterwards re-heard as to the above points, when Lord *Hardwicke* affirmed his decree. *R. L.*

CLARKE *versus* SAMSON, June 21, 1748. [69]

(*Reg. Lib. 1747. A. fol. 714.*)

VOL. I. page 100.—Settlement, on marriage, of estates, leasehold and others, subject to incumbrances. The issue of the marriage not entitled to have them disincumbered out of their father's assets.

The word "grant" does not amount to an entire warranty in equity; nor always at law, where particular covenants are inserted. In such cases the insertion of what is express, excludes the intendment of all presumption.(1)

NOTES AND OBSERVATIONS.

(1) "EXPRESSIO unius est exclusio alterius." Edit.

The ulterior limitation in the settlement was "to such person or persons as should be his own right heir, or to such other person as might claim the same under the will of his father." *R. L.*

The Court (*inter alia*) directed an account of the personal estate of *John Samson* the father, received by *John Samson* the son, or the defendant *James S.* the latter's executor, &c. And in case it should appear that *J. S.* the son paid any of the debts of *J. S.* the father, out of his own estate, then the defendant, his executor, was to stand in the place of the creditors so paid off, to receive a satisfaction, *pro tanto*, out of the personal estate of *J. S.* the father. And what should be coming on the balance of the account of the personal estate of *J. S.* the father come to the hands of *J. S.* the son was to be answered by the defendant, his executor, out of his assets, in a course of administration; and if there should be any surplus of the personal estate of *J. S.* the father, it was to be considered as part of and carried to the account of the personal estate of *J. S.* the son. The Master was also to take an account of the personal estate of *J. S.* the son, received by the defendant, his executor, &c. &c. And he was likewise [70] to take an account of the rents and profits of the real estate of *J. S.* the father descended to *J. S.* the son, accrued since the death of *J. S.* the father, which had been received by *J. S.* the son, or the defendant, his executor, &c. And what should be coming on the said account was to be applied in payment of the debts of *J. S.* the father which should remain unsatisfied by his personal estate not specifically bequeathed. And if any of the credi-

tors by specialty of the said *J. S.* the father should exhaust his personal estate in satisfaction of their debts, the simple contract creditors were to stand in their place to receive a satisfaction, *pro tanto*, out of the real estate. *Reg. Lib.*

SAVILLE *versus* TANKRED, June 21, 1748.

(*Reg. Lib.* 1747. *B. fol.* 395.)

VOL. I. page 101.—Parties—To a bill by representative of pawnee of a chattel against a third person merely for a delivery of it the owner need not be made a party.

NOTES AND OBSERVATIONS.

THE hearing of the cause came on about a week after this objection.

It appears that the jewels had been placed in Mr. *Saville's* hands by way of collateral security for a sum of 3000*l.* and had been left by him in the house of the persons to whom the defendant was the representative; and with whom he lodged, till his death. Those persons had been in the habit of paying and receiving money for him for a great length of time, and the same circumstances took place also between the plaintiff and the defendant as representatives to the several parties. Accounts had been from time to time regularly settled between the [71] original parties; and an account had likewise been settled between the plaintiff and defendant, in which a balance was admitted to be due to the plaintiff. The defendant, however, by her answer, said there had been an omission of a charge in the several settled accounts for the standing of the iron chest, which contained the jewels, in a room in her house, which, from an apprehension that the chest contained things of great value, she had not thought it safe to let to any person, as she might otherwise have done. She, therefore, insisted upon having a reasonable satisfaction made her for the same. But the Court decreed,

“the defendant to pay the plaintiff the balance of the money account in the pleadings mentioned, she having admitted assets; and that the iron chest with the labels with the title of the cause affixed thereto, which had been deposited in the bank, and placed to the credit of the cause by virtue of an order of, &c. should be delivered out of the bank, with the privity of the Accountant General to the plaintiff, or to such person as she should authorise by letter of attorney for that purpose, which decree was to be without costs on either side.” *R. L.*

MARRYAT *versus* TOWNLEY, June 27, 1748.

(*Reg. Lib.* 1747. *B. fol.* 479.)

VOL. I page 102.

[72] MILNER *versus* MILNER, June 11, 1748.

(*Reg. Lib.* 1747. *B. fol.* 561.)

VOL. I. page 106.

ARNOLD *versus* CHAPMAN, June 12, 1748.

(*Reg. Lib.* 1747. *A. fol.* 649.)

VOL. I. page 108.—Mortmain. Assets not marshalled in favour of a bequest to a charity, void under the statutes, as charged on real estate.(1)

NOTES AND OBSERVATIONS.

(1) VIDE also *Attorney General v. Graves*, *Amb.* 158, and *Attorney General v. Tomkins*, *ib.* 216. Lord Hardwicke there observes, “If there are general legacies, and the testator has charged his real estate with payment of all his legacies, the personal estate being insufficient to pay the whole, the Court has said that the legacy to the cha-

riety shall be paid out of the personal estate, and the rest out of the real, that the will of the testator may be performed in *toto*." and in another case, 2 *Ves.* 53, his Lordship says, it allows marshalling as above, when there are two different funds for the payment of the debts and legacies. But it is settled, that the Court will not thus marshal assets where the bequest to the charity is absolutely contrary to law. See *Mogg v. Hodges*, 2 *Ves.* 52. *Attorney General v. Tindal*, *Amb.* 614. *Foster v. Blagdon*, *ibid.* 704. *Hillyard v. Taylor*, *ibid.* 713. *Middleton v. Spicer*, 1 *Bro.* 201. *Makeham v. Hooper*, 4 *Bro.* 153.

The case mentioned in the principal one, page 109 and 110, as on the will of Sir John James, is that of the *Attorney General v. Lord Weymouth*, *Amb.* 20.

Roper v. Ratcliffe, cited p. 110, is in 9 *Mad.* [73] 190. 10 *Mad.* 237; and 5 *Bro. P. C.* 360. Octavo Ed. *Quod vide.*

ELLISON *versus* AIREY, July 13, 1748.

(*Reg. Lib.* 1747. *B. fol.* 699.)

VOL. I. page 111.—Legacy of 300*l.* to E. to be paid at 21, or marriage; but if she died before, then to the younger children of F., E. having died unmarried under 21, held to vest in such of the younger children as were living at that time. (1)

NOTES AND OBSERVATIONS.

(1) THE Court declared, "that by the death of E. P. before she attained the age of 21 years, or was married, the said legacy vested in, and belonged to the three children of F. who were living at the time of the death of the said E.; to be equally divided between them; and the Master was to compute interest thereon, from the time of the said E. P.'s death." *R. L.*

Heathe v. Heathe, cited in the report, is in 2 *Atk.* 121.

It seems that the general rule is, that where the bequest

to the children is general, and not limited to a particular period, it is then confined to the death of the testator; but where it is to one for life, or where the distribution is postponed to a future time, those children are let in, who are born during the life, or before that time. See the authorities on each head, collected by Mr. Sanders, 2 *Atk.* 122, note (2).

STOCKWELL *versus* TERRY, July 15, 1748.

(*Reg. Lib.* 1747. *B. fol.* 491.)

VOL. I. page 115.

[74] FONNEREAU *versus* FONNEREAU,
August 5, 1748.

(*Reg. Lib.* 1747. *A. fol.* 520.)

VOL. I. page 118.—S. C. 3 *Atk.* 645. Legacy to F. when he shall attain 25; with directions that it shall be invested, and its interest paid, in the meantime for education, and for part of the principal to place him out, is a vested interest, and transmissible, though he died before that age. (1)

NOTES AND OBSERVATIONS.

THE question came before the Court on petition.

(1) On the distinction between the actual vesting of legacies where the time of payment only is postponed, and where the precise time is of the substance of the gift, see *Roper* on Legacies, 1 vol. 216, &c. Mr. Cox's note, 2 *P. W.* 612. And Mr. Sanders' notes to *Steadman v. Pulling*, 3 *Atk.* 427, and to the principal case, 3 *Atk.* 645, note 2. Likewise *Hanson v. Graham*, 6 *Ves.* 239, 242, 245.

Lundy v. Williams, cited in the report, is in 2 *P. W.* 480, and *Attorney General v. Hall*, *ibid.* is in 8 *Vin. Ab.* 103, *pl.* 50.

BARNESLY versus POWEL, Aug. 5, 1748.

(*Reg. Lib.* 1747. *A. fol.* 641.—*And Reg. Lib.* 1748. *A. fol.* 583, 584.)

VOL. I. page.119.—See also 1 *Ves.* 284. *et postea.* Issues as to the forgery of a will and other instruments.

NOTES AND OBSERVATIONS.

THE trial was at bar in K. B. and appears from *Reg. Lib.* to have lasted several days. After a full hearing, the jury found that the paper writing, dated, &c. was not duly published by the said *W. B.* de- [75] ceased, as his last will and testament, and signed by him, and attested and subscribed in his presence by three credible witnesses; and they found upon the second issue, that the two other paper writings, bearing date respectively, &c. were not sealed and delivered by the said *W. B.* deceased. They, moreover, stated that they grounded their verdict on forgery, and not on any particular defect in the execution of the will.

The cause came on again before Lord *Hardwicke*, upon the equity reserved on the 10th of July, 1749, when it was (*inter alia*) decreed, that all the agreements, &c. obtained from the plaintiffs should be set aside, and be delivered up to be cancelled, and that the said defendants should be restrained from making use of, or insisting upon the decree made in the Court of Exchequer, and from claiming any benefit thereby; and the defendants were ordered to deliver up possession of the real estate in question, &c. and to pay the plaintiff his costs of the suit, and his costs at law. *Reg. Lib.* 1748. *A. fol.* 583, 585. As to the sentence in the Prerogative Court, the defendant was ordered to consent to a reversal of it, &c. See 1 *Ves.* 284, *et postea.*

ALLEN *versus* POULTON, October 25, 1748.

(*Reg. Lib.* 1748. *A. fol.* 317.)

Sir W. Fortescue, M. R.

VOL. I. page 121.—Trust of a copyhold devisable without a surrender. As to another copyhold of which the testator had the legal estate, heir put to his election.
Election as to estates at common law.

NOTES AND OBSERVATIONS.

BESIDES the legacies to the eldest son, the testator devised to him his manor of Westbury, in the parish of Barking (which was an estate in fee simple,) “and all other his freehold estate, messuages, lands, tenements, tythes, and hereditaments in the said parish, for the term of fourscore years, if he should so long live; and from and after his decease he gave the said manor to the plaintiff for life.” He made no disposition of the reversion, which descended upon the defendant as his eldest son and heir.

The bill stated, that the defendant did all he could to frustrate his father's will, although he was (*inter alia*) amply provided for by the said will, and also by his father's suffering the reversion of his freehold estate to descend to him; and, after submitting that no surrender of the trust copyhold estate to the use of the will was necessary, or could be made by the testator, it insisted, as to the copyhold not surrendered, that a surrender ought either to be supplied in favour of the plaintiff, or that at least the defendant ought not to be permitted to claim under the said will, and in contradiction to it; but that he must abide by, and submit to, the said will entirely, or relinquish all he was entitled to under it; whereas he had received his legacy of 500*l.* and also part of his share of the residue of the testator's estate under the will.

The defendant by his answer insisted, that he might well take such estates as descended to him as heir, and likewise such real and personal estates as were devised to him; nor did he apprehend, that his taking the estates as heir at law, would at all control or contradict the said will. He also stated (*inter alia*) that neither of the copyhold estates appeared to have been intended to pass by the will; for that the testator was an attorney at law, and very well knew the necessity of a surrender, &c.: and that as the testator did not intend to devise all his estate by his said will, which most clearly appeared by his devising only estates for life out of his freehold estates, suffering the reversion thereof to descend on the defendant, so the testator intended the said copyhold premises might descend in the same manner.

The Court ordered the defendant to surrender the two copyhold estates in question to the plaintiff at the plaintiff's expense, &c.; and did not give costs on either side.
R. L.

The case cited of the King's Head Inn, Turnham Green, is *Gascoigne v. Barker*, 3 *Atk.* 8. That of *Banks v. Den- shire*, is in 1 *Ves.* 63, *et antea* 49. Vide *Blunt v. Clithe- row*, 10 *Ves.* 589.

Though an heir will be put to his election in the case of unsurrendered copyholds, *ut supra*, and in *Cooke v. Hel- lier*, 1 *Ves.* 234, *et post*; and in *Unett v. Wilkes*, *Amb.* 430, and *Rumbold v. Rumbold*, 3 *Ves.* 65, &c. yet it is otherwise in regard to freeholds or real estates at the common law, when the will is incompetent [78] to pass them on account of a want of due execu- tion, attestation, &c.: or of infancy, &c. *Hearle v. Green- bank*, 3 *Atk.* 695, 715. *Sheddon v. Goodrich*, 8 *Ves.* 481, 496; and the reason seems to be, that in the latter case, the will being void as far as respects the land, can- not be looked at to ascertain an intention relative thereto; whereas it is otherwise as to copyholds.

But even in the case of freehold lands under such a will, the heir will not be allowed to claim a legacy, if the testator has imposed an express condition, that the legatee shall forfeit his interest if he does not comply with the will in toto. Vide *Boughton v. Boughton*, 2 Ves. 12, *et postea*.

REECH *versus* KENNEGAL, Oct. 26, 1748.

(*Reg. Lib.* 1748. *B. fol.* 234.)

VOL. I. page 123.

THE case of *Whitton v. Russel*, as cited and stated p. 124, was on appeal from the Rolls, and was in affirmance of his Honour's decree, *Reg. Lib.* 1738, *B. fol.* 520. The entry of the original decree, (*Reg. Lib.* 1736, *B. fol.* 527) is very short, being that merely of a dismissal of the bill: but it is proper to state, that a draft of the bond mentioned in the report had been prepared. A paper writing appears entered as read at the original hearing, which purports to be the "draft of a bond, prepared for the execution of the defendants, *Harrison* and *Russell*, and *Abraham Collyer*." *R. L.*

[79] The editor has a MS. note upon the passage at the bottom of p. 125, and top. of p. 126, of the principal case, referring to one of *Rann v. Hughes* as a judgment delivered in the Exchequer Chamber, *Trin. Term.* 1776.

BINGHAM *versus* BINGHAM, Oct. 27, 1748.

(*Reg. Lib.* 1748. *A. fol.* 154.)

VOL. I. page 126.—Equity relieves against bargains made under a misconception of rights.

NOTES AND OBSERVATIONS.

THE material facts were as follows: One *John Bingham* (*inter alia*) devised an estate tail, in certain lands, to *Daniel* his eldest son and heir, limiting the reversion in fee to his own heirs. Daniel left no issue, but devised this estate to the plaintiff in fee. The bill stated, that the latter, being ignorant of the law, and persuaded by the defendant, and his scrivener and conveyancer, that Daniel had no power to make such devise, and being also subjected to an action of ejectment, purchased the estate of the defendant for 80*l.*; and that it was conveyed to him by lease and release. The bill was to have this money repaid with interest. The defendant, by his answer, first of all insisted, that Daniel had no power to make such devise; but if he had, he urged, that the plaintiff should have "been better advised before he parted with his money, for that all purchases were to be at the peril of the purchaser." The decree was for the money, with interest and costs. *R. L.*

PEACOCK *versus* MONK, Oct. 28, 1748. [80]

(*Reg. Lib.* 1748. *B. fol.* 126.)

VOL. I. page 127.—Deed and will executed on the same day; the deed held a testamentary act, and as voluntary and void against creditors under the 13 *Eliz.*

Parties—Not necessary to make any other than the executor parties relative to the personal estate; since he sustains the power of the testator to defend the estate for himself, creditors and legatees.

NOTES AND OBSERVATIONS.

THE bill (*inter alia*) insisted, "that the 4000*l.* by virtue of the deed, became the property of *Monk*, subject to the covenants; and that it was not to be considered as part of Admiral *Lestock's* assets, or subject to his debts; and that the plaintiff's were in nature of creditors of *Monk*,

but unable to sue him at law, by virtue of the said securities being made in manner aforesaid." *R. L.*

The Court (amongst other things) "declared the plaintiffs, *Peacock* and *Cockburn*, were entitled to the said several sums of 1000*l.* and interest, from the end of two months after the death of Admiral *L.*; and that the plaintiff, Mrs. *Knowles*, was entitled to her annuity, &c. &c. as against the defendant, *William Monk*, as executor of Admiral *Lestock*, and also against all the said testator's legatees, and any other persons not claiming under the said Admiral *Lestock* for valuable consideration; but that the plaintiff's ought to be postponed, as to all creditors for valuable consideration of the said Admiral *Lestock*. *R. L.*

[81.] *BUTTERFIELD versus BUTTERFIELD,*

Oct. 29, 1748.

(*Reg. Lib. 1748. A. fol. 75.*)

VOL. I. page 133 and 154.—Interest of money given to A. for life, and for the heirs of his body, with a limitation over, if he died without issue. A. takes the whole, the limitation being too remote.(1)

NOTES AND OBSERVATIONS.

ON appeal from the Rolls, where it had been heard by consent.

It appears from *R. L.* that the words in the latter clause were, "if he should die without issue;" not "heirs."

The Master of the Rolls, upon *John Butterfield's* having waved any right which he might have to the money, had decreed, that the stock in which this 400*l.* had been invested, should be transferred to a trustee or trustees, &c. who were to pay the interest, &c. to the plaintiff for life; and who, upon his death, were to transfer the stock to his children, if he should have any; and if he should die without issue, they were to transfer it to his executors or ad-

ministrators. This decree was reversed, and the stock ordered to be transferred to the plaintiff. *R. L.*

(1) Vide also *Flanders v. Clark*, 1 *Ves.* 9, and the note upon it, antea 12. Lord *Beauclerc's* case, cited p. 134, is in 2 *Atk.* 308.

OKE *versus* HEATH, November 4, 1748. [82]

(*Reg. Lib.* 1748. *A. fol.* 215. Entered *Oke v. Gill.*)

VOL. I. page 135.—A wife having power to appoint 4000*l.* to any of her kin; and, for want of appointment, to go according to the statute, appoints it by will to her nephew, “upon condition,”(1) that he paid his mother an annuity of 100*l.* She then bequeathed to her niece S. all the rest and residue of what she had power to dispose of. The nephew dying in her lifetime, the appointment, as to him, was void, but not so as to the annuitant,(2) and the remainder was held to pass by the above residuary bequest.

NOTES AND OBSERVATIONS.

(1) THE words in *R. L.* are as here, “upon condition that he paid.”

(2) See *Wigg v. Wigg*, 1 *Atk.* 382, and *Hills v. Wirley*, 2 *Atk.* 605. This latter case is the one cited in the report, p. 136, as decided 6th July, 1746.

Burnet v. Holgrave, mentioned pp. 137 and 140, as in *Eq. Ca. Ab.* 296, is imperfectly reported there. Vide 2 *Ves.* 80.

Upon the distinctions between trusts and powers, vide in *Brown v. Higgs*, 8 *Ves.* 561, 570, &c.

BAGSHAW *versus* SPENCER, Nov. 12, 1748.

(*Reg. Lib.* 1748. *A. fol.* 152.)

VOL. I. page 142.—On appeal from the Rolls; vide 2 *Atk.* 570. Devise.—Limitations apparently legal as uses executed—Held to be trusts, from the purposes to be answered; by a preceding

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devise to trustees for payment of debts, &c. Question as to whether an estate for life, or in tail.
Strict settlement.

NOTES AND OBSERVATIONS.

THE case of *Lord Say and Seale v. Lady Jones*, cited p. 144, is in 8 *Vin. Ab.* 262. 1 *Eq. Ab.* 389, and 3 *Bro. P. C.* 113, octavo ed.

Long v. Beaumont, cited p. 147, is in 3 *Bro. P. C.* 60, octavo ed.; and there called "*Darbison v. Beaumont.*"

[83] *Coulson v. Coulson*, cited also p. 147, is in 2 *Stra.* 1125. 2 *Atk.* 246, &c. Vide *Hodgson v. Ambrose*, *Dougl.* 323, *S. P.* Lord *Hardwicke's* observation on *Coulson v. Coulson*, in the next page, if "this case be law," might be thought merely casual, and as implying no doubt of the decision; but from what follows, the author thinks his Lordship meant to show somewhat of a dissatisfaction. The author is in possession of a copy of *Strange's Rep.* which formerly belonged to Mr. Bearcroft, and there is a MS note on the case of *Coulson v. Coulson*, in Mr. *Bearcroft's* hand-writing, as follows—"In the case of *Chapman on dem. of Oliver v. Brown*, Lord *Mansfield* mentioned the case of *Coulson v. Coulson*, and said the determination gave great dissatisfaction to the bar; and also that upon a similar occasion Lord *Hardwicke* made a case to be sent to the Court of K. B. to be solemnly argued; 'and he told me' (said my Lord *Mansfield*) 'that he never was satisfied with the determination, though he would not himself determine against it without the opinion of the Court. E. B.'"

Lisle v. Gray, cited p. 149, is in 2 *Lev.* 223, and *Raym.* 278. *Sir J. Hobart v. E. of Stamford*, is in 19 *Vin. Ab.* 360. *Fearne Cont. Rem.* [173] and 3 *Bro. P. C.* 31, octavo ed.

Ashton v. Ashton, cited also p. 149, was on a re-hearing, 14th Nov. 1734. *Reg. Lib.* 1734, *A. fol.* 151.

The Court there, after the declaration of its being an estate for life in G. I. A. directed a conveyance in strict settlement accordingly "to his use for life. Rem. to trustees, to preserve, &c. Rem. to his first [84] and other sons in tail general: Rem. to his daughters in tail, as tenants in common, and not as joint tenants; with cross remainders over. Rem. in fee to the defendant; *R. A. R. L. fo. 152.*"

Withers v. Algood, cit. p. 150, is in *R. Lib. 1734, B. fol. 276.*

It should be observed, upon the principal case of *Bagshaw v. Spencer*, that Lord *Thurlow* said he was not satisfied with the reasons of the determination. Vide in *Jones v. Morgan*, 1 *Bro. 217, 221, 222.*

See also *Fearne, Cont. Rem. [166,] [207,] [211,] [215,] &c. &c.*

BUXTON *versus* SNEE, November 15, 1748.

(*Reg. Lib. 1748. A. fol. 176*, entered "*Buxton v. Sidebotham.*")

VOL. I. page 154.—No lien on a ship, or proceeds from sale of it, for repairs done, except in course of a voyage; liberty given to bring an action as to the personal liability of the part-owners who received the benefit.⁽¹⁾

Lord *Hardwicke's* decision in *Doddington v. Hallett*, 1 *Ves. 497*, over-ruled; and now settled that part-owners in a ship are not to be considered as partners.

NOTES AND OBSERVATIONS.

(1) It appears from the ultimate decision of *Sansum v. Brogginton*, reported 1 *Ves. 443*, and that where the vessel was hypothecated for repairs done abroad, and afterwards lost, the part-owners were held personally liable respectively. They were first, as between themselves, to contribute according to their respective shares; and under a deficiency contemplated in respect of one of the parties, the other was held responsible, as if he had been a partner.

Vide *Reg. Lib.* 1749, *B. fol.* 373, &c. Lord *Hardwicke* followed a like course in *Doddington v. Hallett*, 1 *Ves.* 497, and seems, upon the very face of the record, to have gone much too far in so doing; since the agree-
 [85] ment between the part-owners (whom he treated as partners,) as it appears in *Reg. Lib.* expressly negatived any such conclusion. They thereby covenanted and agreed “severally, and not jointly, every one for himself.” (See *postea* () the notes on that case.) It seems now, however, to be settled, on great consideration, and by several decisions, that Lord *Hardwicke* was wrong in considering part-owners as partners; and that the determination in *Doddington v. Hallett* is to be considered as over-ruled. Vide *Ex parte Young*, 2 *Ves. & Beames*, 242, per Lord *Eldon*, C. and *Ex parte Harrison in m. of Nicholson*, 2 *Rose Rep. in Bankruptcy*. *Brent v. Hay*, Feb. 10, 1815, &c. &c.

As to the maritime law on hypothecation, and the general liability of the owners. See *Molloy*, 213. *Salk.* 34, pl. 8. *Garnham v. Bennett*, 2 *Stra.* 816. *Morse v. Slue*, 1 *Ventr.* 190, 228. *Spearing v. Degrave*, 2 *Vern.* 643. *Cary v. White*, 5 *Bro. P. C.* 325, octavo ed. *Rech v. Coe*, *Cowp.* 636, 639. *Farmer v. Davies*, 1 *T. R.* 108. *Yeates v. Hall*, *ibid.* 73. *Ellis v. Turner*, 8 *T. R.* 531. *Tolson v. Hallett*, *Amb.* 269, and *Stat.* 7 *G. 2 C.* 15, *et ut supra*.

BURNETT versus MANN, November 16, 1748.

(*Reg. Lib.* 1748. *A. fol.* 634.)

VOL. I. page 156.—Posthumous brother of the half-blood, entitled under statute of distribution.

Appointment pursuant to a power, good; though executed by will of a feme covert.

NOTES AND OBSERVATIONS.

Wallis v. Hadson, cited p. 156, is in *Barnard*, 272, and 2 *Atk.* 115. *Lady Roscommon v. Major Fowke*, cited p. 157, is in 6 *Bro. P. C.* 158, octavo ed. Vide *ibid.* 167, note.

ROACH *versus* GARVAN, Nov. 16, 1748. [86]

(*Reg. Lib.* 1748. *B. fol.* 32.)

VOL. I. page 157.—S. C. 1 Dick. 88. Guardian and ward. Marriage of a Ward of Court to a foreigner out of the realm.

Guardianship.

Protection of the Court. Its interference, &c.

Removal of a testamentary guardian.

NOTES AND OBSERVATIONS.

THE Statute of Queen *Anne*, referred to by Lord *Hardwicke*, p. 158, is 7 *Anne*, c. 5. Explained by 4 *Geo.* II. c. 21.

The other statutes alluded to by his Lordship in the same page are the 1 *Ja.* I. c. 4, and 3 *Ja.* I. c. 5. These (*inter alia*) made it criminal for persons within the realm to contribute towards the maintenance of British subjects placed in foreign priories, abbeys, nunneries, &c. Notwithstanding the several toleration acts in favour of the Roman Catholics, and particularly the 31 *Geo.* III. c. 32, the clause above referred to seems even as yet to be unrepealed, except with regard to such Roman Catholics as take the oaths prescribed by those statutes.

This should be noticed, since heavy penalties may be incurred, in the present state of things, very innocently.

As to the conclusiveness of foreign sentences, adverted to p. 159, vide 1 *Vern.* 21, and Mr. *Raithby's* note.

With regard to Lord *Hardwicke's* refusal to allow any money to the alleged husband, p. 159, and several other points in this case, see *De Manneville v. De Manneville*, 10 *Ves.* 52, 56, &c. &c. and the cases cited in it.

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The guardianship of daughters is determined by their marriage, but it is otherwise of sons. See 1 *Ves.* 91. But nevertheless, and although a female Ward of Court may, after coming of age, make whatever settlement she please, it is still indispensable, in order to exclude the further cognizance of the Court, for her either to come into Court to show her actual consent to the proceeding, or to have such consent taken by commission; "for she is not discharged from the protection of the Court, except by the act of the Court." Therefore it is, that until "such a consent is recorded, a ward must always be considered as encircled by the Court's protection."

Per Lord *Eldon*, C. Lincoln's Inn Hall, March 12, 1802, upon a petition to explain an order under which it had been referred to the Master, to see whether a settlement made by a ward when adult was proper, or not: Mr. *Hall*, as counsel, submitting, that such a reference was unnecessary. Author's MS note.

As to removing a testamentary guardian, see in *D. Beaufort v. Berty*, 1 *P. W.* 704, accord. *Foster v. Denny*, 3 *C. Ca.* 237, and 1 *Eq. Abr.* 260, would seem contra; and so likewise *Dillon v. Lady Mount Cashell, Dom. Proc.* 4 *Bro. P. C.* 306 (octavo edition,) and the note at the head of the preceding case, *ibid.* 302. It is clear, upon the principle stated in the report, that a testamentary guardian may be removed for misconduct; see 2 *Fonb. T. E.* 247; so if he becomes a lunatic, Ex parte *Lady Ann Brydges*, *ibid.* 248. The Lord Chancellor has, upon application of an infant, and consent of his relations and guardians, appointed other persons to have the care of him till further order. *Spencer v. Earl of Chesterfield, Amb.* 146.

[88] *BAKER versus WIND, November 19, 1748.*

VOL. I. page 160.—Mortgage—redemption resisted, and mortgage ordered to pay costs. (1)

NOTES AND OBSERVATIONS.

(1) *S. P.* in *Smith v. Smith*, Feb. 13, 1815, before Lord *Eldon*, C. on motion, after the question of the mortgage had been decided in an issue; and the costs were directed to be paid forthwith, although it had been long and much pressed that they ought to be set off in the account of what was due on the mortgage. Edit. See also *Detillin v. Gale*, 7 *Ves.* 583, and *Shuttleworth v. Lowther*, there cited. *Smith v. Smith* is reported in part, *Cooper Rep.* ch. 141.

OGLE versus HADDOCK, November 22, 1748.

(*Reg. Lib.* 1748. *B. fol.* 13.)

VOL. I. page 161.—Bill for an account and share of prize money dismissed; the sum being certain, and the remedy at law against the prize agents.

ALLEN versus PAPWORTH, July 22, 1731.

(*Reg. Lib.* 1730. *A. fol.* 479.)

ALLEN versus PAPWORTH, Nov. 23, 1748.

(*Reg. Lib.* 1748. *B. fol.* 714.)

VOL. I. page 163.—Bill in equity by husband and wife, who had a power of appointment for her separate use, submitting that the subject of it should be applied in payment of his debts by mortgage and otherwise, for which a decree passes, is tantamount to an actual appointment. The heir, therefore, although in being at the time,* and not made a party to the original suit, was not permitted to unravel the accounts taken under that decree; but only to surcharge and falsify. Judgment creditor having procured an assignment of a mortgage, allowed to tack the amount and costs.

* It appears from the subsequent bill of the son that he was in being at the commencement of the proceeding in question, and it is not contradicted in *R. L.* The report in *Vesey* seems inaccurate as to that fact. *Editor.*

NOTES AND OBSERVATIONS.

THE deficiency of statement of this case in Mr. *Vesey* senior's Reports, gave occasion for Sir *John Mitford's* remark as to the judgments in those reports being much more correctly given than the statements of the facts in general, and also to the expression of the wish of [89] the present Mr. *Vesey*, that he might be able to rectify the latter, by reference to the Registrar's Books. See the note to *Whistler v. Newman*, 4 *Ves.* p. 138.

The incessant labours of Mr. *Vesey* have, however, precluded even his diligence from the execution of this desire, which the present editor has to regret, in common with the profession at large.

The case of *Allen v. Papworth* seemed not only to stimulate research, but to require somewhat of a general exposition to the profession. The editor has therefore traced it from its origin.

John Allen and *Susanna*, his wife (the parents of the present plaintiff,) in 1731, filed their bill against *Richard Papworth* (the same defendant that appears in the report) stating, that the plaintiff, *John Allen*, being seized in fee of several freehold hereditaments, mortgaged the same to *L.* who assigned them to *B.* who assigned them to one *Warboys*; and that the plaintiff, being also entitled to some copyhold lands "in right of his wife," he charged them as a further security, with the moneys thus advanced, and other sums, which he alleged had, however, never been advanced, as agreed upon. It then stated, that the defendant, having sued the plaintiff to judgment on a small debt, and charged him in execution, had procured *Warboys* to give him all the title deeds, and, without the plaintiff's privity, to assign over to him the mortgage term, &c. That the plaintiff, having then lately been discharged by an insolvent act, the Clerk of the Peace had assign-

ed all his estate to the defendant in trust for all his, the plaintiff's, creditors; after payment of [90] whom, the overplus was to be paid to the plaintiff. That the defendant had received the rents, &c.; wherefore the bill prayed for an account for a sale of the estate, and payment of the plaintiff's creditors; and for a redemption, upon payment of what was justly due to the defendant and plaintiff's other creditors.

The defendant, *Papworth*, after admitting the former mortgage, &c. stated, indentures of 17th and 18th January, 1723, between plaintiff, of the first part; *Warboys*, of second part; *George Priest* and *G. Hay*, of third part; whereby, in consideration of 270*l.* over and above 180*l.* due to *Warboys*, plaintiff conveyed to *H.* and *P.* several freehold and copyhold premises to the use of *W.*; and after the determination thereof to *P.* and *H.* "on the trusts therein mentioned;" and that plaintiff thereby covenanted to levy a fine of said premises, which was levied accordingly; and on payment of 461*l.* 5*s.* in the release mentioned, the said term was to cease; and that for better securing said 180*l.* and 270*l.* plaintiff, on 24th January, 1723, surrendered some copyhold lands to the use of *W.* his heirs and assigns, &c. according to the release. That said 270*l.* was really then paid, but that *W.* afterwards received part of it, whereby his demand was reduced to 350*l.* He then stated his recovering judgment for 28*l.* but that plaintiff was not charged in execution, defendant being obliged to outlaw him. Finding that would be ineffectual, because *W.* had recovered judgment in ejectment of all said mortgaged premises, and had been admitted to the copyhold premises, he, defendant, procured an assignment from *W.* by deed, 9th [91] March, 1724, in consideration of 382*l.* 8*s.* &c. He admitted the assignment from the clerk of the peace, that 490*l.* was then due to defendant for principal, interest, and costs on the mortgage; and that the costs of the

outlawry and proceedings therein amounted to 61*l.* 9*s.* 8*d.*; and that plaintiff was, besides, indebted to him in various other sums for costs and charges to which he had been subjected. He then craved an allowance of all such sums, and submitted to re-convey on payment of them all.

His Honour directed an account of what was due to defendant on his mortgage, and to tax his costs both at law and in equity, and to take an account of what was due to him on his judgment. Notice was directed to be inserted in the Gazette for all such to come in as were the plaintiff's creditors before the said Insolvent Act. An account was then directed as to the defendant's receipts, &c.; then a sale of the mortgaged premises, the proceeds of which were to be applied, first in payment of all that should be found due to the defendant on the above account, and then of the above-mentioned other creditors. If there were any surplus, it was to be paid to the plaintiff; if there should be a deficiency, the said creditors were to abate in proportion. *R. L.*

It appears from *Reg. Lib.* 1748. *A. fol.* 714—That the plaintiff *Susanna* died, pending the accounts before the Master, directed in the above suit; leaving *Felix Allen*, her eldest son by the plaintiff *John*, and her heir at law, &c. *Felix Allen* filed his original bill against *Papworth*

the mortgagee and his father, stating that the
 [92] estates were settled by the father of his mother *Susanna*, by way of remainder (after his own life estate) to his father and mother, and the survivor of them, for life, with remainder to the heirs of the mother by the defendant his father, with remainder to her right heirs. That his grandfather having died, the plaintiff's father borrowed 100*l.* on mortgage of the premises so settled. That his father purchased some copyhold premises of his own, and mortgaged them, with an assignment of the other premises on further advances. That the father and mother levied a fine, and suffered a recovery, the uses of

which were declared by a deed in 1723, for the purpose first, of securing the mortgage moneys, and afterwards for the separate use of the mother for life, and then to the use of her heirs and assigns. That the mortgagee having assigned the several premises to the defendant *Papworth*, in 1724, he took and continued in possession, &c. That the father and mother, in 1731, brought their bill against *Papworth*, for an account of the rents, &c. and for a redemption. In which suit, in the same year, the Master of the Rolls decreed accordingly; and that the premises should be re-assigned to the plaintiff's father. That pending the account before the Master, the plaintiff's mother died; and the bill alleged, that, notwithstanding, all the premises, by virtue of the settlement, descended to the plaintiff upon his mother's death, and he came of age so far back as 1743.* Yet, as by the de- [93] fault of his father, and his agents, he was made no party to that suit, the defendant therein being to assign the premises to the plaintiff's father only, he the plaintiff had been kept in the dark, and ignorant of his title to, and interest in, the premises until then lately, &c. &c. and contended that the defendant *Papworth* was indebted to the plaintiff on account of his receipts in 500*l.* and upwards, &c. The bill prayed an account—payment of the balance—delivery of possession, &c. *Felix Allen*, the last mentioned plaintiff, having died, the suit was revived by his sister, and heir at law. The defendant *Papworth* (*inter alia*) stated, that the parties not only assigned such lands as they had before mortgaged, but likewise, all other lands and tenements, both freehold and copyhold, for a term of 500 years, subject to redemption; and then to other uses. He denied that any recovery was suffered, or such uses

* He must therefore have been in *esse* at the commencement of the proceedings, contrary to the statement in Mr. Vesey's report, since the answers in *Reg. Lib.* do not contradict this assertion. EDIT.

declared as were stated by the bill, but admitted that a fine was levied, the uses of which were declared by the decree of 1723, to be to the use of the mortgagee for the residue of the term of 500 years, by way of mortgage, and afterwards to the use of *Priest* and *H.* their heirs and assigns, for the lives of the father and mother, and the longer liver of them, on the trusts after mentioned, and after their death to the heirs of the body of the wife by her said husband; and for default of issue, to her in fee.

That the estate, so limited, in use to *P.* and *H.* was so vested on special trust, that they should, during the life of the wife, (subject to the mortgage) employ the rents of the premises for the sole and separate use of

[94] the wife and her children for her and their maintenance and education, and pay the same to her, or whom she should appoint, exclusive of her husband, and so as she should have no power in respect thereof; and after her decease, in trust, to stand seised or to convey, &c. as the wife, in the lifetime of her husband, notwithstanding her coverture, as well without, as with his consent, and after his decease by any writing, or by her will should appoint, and for want thereof to her heirs and assigns.

The defendant, after stating the facts, as to his judgment, and his having procured an assignment from the *Warboys*, submitted, that the amount of his judgment and costs should be a charge on the premises.

He also stated, that there was no other surrender of the copyhold than the one he had before mentioned, nor to any other uses than the above; and insisted that the plaintiff's father had a right to charge the premises, or some part thereof, with a further sum than the said 350*l.* which he hoped to be able to prove. He also insisted, that the Master's report under the former decree, whereby 625*l.* 12*s.* 11*d.* was found due to him should not be unravelled, and that he ought not to be obliged to account with the plaintiff, except from the foot of that account. The Court

referred it to the same Master, to carry on the accounts directed by the former decree on the foot of that decree, and the several proceedings had thereon ; with liberty for the plaintiff to surcharge or falsify the said accounts ; and declared, that the rents and profits of the estate in question that had accrued during the lifetime [95] of the defendant *J. A.*'s late wife, and which should accrue during his life, were by virtue of the said decree, and former proceedings, subject to all the debts of the said *J. A.* and decreed accordingly ; and that the only other creditor who had proved his debt against *J. A.* under the former decree, should be paid the amount of his debt, as reported. If there should be any balance due to the defendant *Papworth*, he was to be redeemed by the payment of the plaintiff, and to convey to her and her heirs, &c. In case that defendant should appear to have been overpaid, then so much of the mortgaged premises as should appear to belong to the plaintiff, by virtue of the settlement of 1723, should be conveyed to her, &c. and the residue thereof, to the defendant *J. A.* &c. And the Court reserved the consideration of any directions touching any contribution to be made by the defendant *J. A.* to the plaintiff, and also of any right of redemption which the defendant *J. A.* might have as to any part of the mortgaged premises that belonged to him, and was not comprised in the settlement of 1723, &c. &c. *Reg. Lib.*

WORTLEY *versus* PITT, Nov. 23, 1748.

(*Reg. Lib.* 1748. *B. fol.* 12.)

VOL. I. page 164.

STONES *versus* HEURTLY, Nov. 25, 1748.

(*Reg. Lib.* 1748. *B. fol.* 554.)

VOL. I. page 165.—Devise to trustees by sale or mortgage to pay debts; the remainder to go and be equally divided among three children, and the survivor of them and their heirs for ever: a tenancy in common. (1)

NOTES AND OBSERVATIONS.

(1) SEE *Hawes v. Hawes*, and *Mendes v. Mendes*, 1 *Ves.* 13 and 89, *et ante* 15 and 65, and 7 *Ves.* 286.

The last words of the devise were “given them and settled upon them by his will and otherwise howsoever.”

Stringer v. Phillips, cited page 165, is in 1 *Eq. Ca. Ab.* 292. *Blisset v. Cranwell*, cited p. 167, is in 3 *Lev.* 373, and *Salk.* 226.

CARTER *versus* CARTER,

November 26, and December 5, 1748.

(*Reg. Lib.* 1748. *A. fol.* 610.)

VOL. I. page 168 and 169.

JOHNSON *versus* ARNOLD, Dec. 5, 1748.

(*Reg. Lib.* 1748. *A. fol.* 160.)

VOL. I. page 169.—Money considered as land to effectuate the general intentions of testator.

NOTES AND OBSERVATIONS.

H. S. by his will “reciting, that chief part of his estate was vested in partnership with his executor, directed his said executor to pay to the plaintiff *George Johnson* 4000*l.* by instalments of 500*l.* *per annum*, which instalments were to be laid out,” &c.

The former bill, mentioned at page 170, as brought by the present plaintiff, was filed by him and an infant daughter (who had since died) for an execution of the trusts. *R. L.*

In the present suit it was declared, "That it appeared to the Court that it was the intention of the testator in his will, that the sum of 4000*l.* should finally be laid out in the purchase of lands, in order to effectuate the several limitations in his will, but not in the lifetime of the plaintiff. *George Johnson*, without his consent, and after the decease of the plaintiff, *George Johnson*, the defendant *W. A. &c.* would be entitled to the several sums of money bequeathed to them," &c. The Court did not give any costs to any of the parties. *R. L.*

BRYANT *versus* SPEKE, Dec. 6, 1748.

(*Reg. Lib.* 1748. *A.* fol. 156, entered *Bryant v. Gould.*)

VOL. I. page 171.—It was the rule in Lord Hardwicke's time to give interest at 5 *per cent.* on legacies out of personal estate, and 4 *per cent.* out of real. (1) It has now long since been altered, and the general rule is that they shall all carry interest at 4 *per cent.* from the end of a year after the testator's death. (2) The case of maintenance is an exception. (3)

NOTES AND OBSERVATIONS.

(1) SEE 1 *Ves.* 277, and 2 *Ves.* 239.

(2) Vide *Sitwell v. Bernard*, 6 *Ves.* 520, 543, 544, where Lord *Eldon*, C. disapproves the Court's going further on particular circumstances (except as to maintenance.)

(3) *Sitwell v. Bernard*, 6 *Ves.* 520.

DUKE OF LEEDS *versus* POWELL,

December 7, 1748.

(*Reg. Lib. 1748. A. fol. 110.*)

VOL. I. page 171.—Bill in equity lies for payment of an entire rent out of a manor, where there are no demesne lands on which to distrain.

NOTES AND OBSERVATIONS.

(1) THE bill stated the grant “as of a fee-farm rent of 36*l.* 16*s.* 8½*d.* issuing out of, or reserved for, the lordship of L. N. in the county of Cardigan, alone, or together with other manors, lordships, lands, tenements, or hereditaments, and the reversion, &c. thereof, and all the right and title of his said Majesty, his heirs and successors, to the same, to hold to, and to the use of the said Earl, and his heirs for ever.”

The bill, after alleging that from the time of the grant the said fee-farm rent was duly paid at Michaelmas, yearly, as it became due, by the owners and proprietors of the manor, &c. and that the said Earl having died long since, his estate and interest in the said fee-farm rent vested in the plaintiff, who was seised thereof in fee, and that it had been so paid (as aforesaid) to his guardian for his use; stated the defendant to be seised in fee, as proprietor of the manor, and that he ought to have paid the said fee-farm rent to the plaintiff as it became due; but, that there became due to the plaintiff, at Michaelmas 1744, 110*l.* 10*s.* 11½*d.* for three years arrears, which the defendant refused to pay, alleging, that the same was not one entire rent, but consisted of several small rents, issuing out of several freehold lands within the manor, and payable by the tenants of the said lands, and that he, the

[99] defendant, held only one tenement within the manor, for which a small rent was due, &c. whereas the plaintiff charged that the said rent was one

entire rent, issuing, and used to be paid by the proprietors of the manor for the time being, &c. and that the plaintiff was totally unconcerned in any disputes between the defendant and the tenants; and neither did the payment of the plaintiff's said entire rent any way depend on the payment or non-payment of the rents of the particular tenants; and the plaintiff charged that he was advised, that he had no authority to make any distress upon any of the lands, &c. within the manor, save only such as were in the actual possession of the defendant, and that, being only one tenement upon which no distress could be found to answer the arrears due to the plaintiff, he could not recover the said rent and arrears thereof in the usual method at common law, and could not charge or affect the manor, and the rents, services, and other profits thereof, without the aid of the Court. The bill prayed that the defendant might account with the plaintiff for the said sum of 110*l.* 10*s.* 11½*d.* rent due at Michaelmas 1744, and all arrears since, and which should become due to the plaintiff; and that the defendant might be decreed to pay the said rent as the same should grow due to the plaintiff, and that the said manor, or lordship, and the rents, services, and other profits thereof, might be subjected to the payment thereof, or that the same might be sequestered by the Court for the payment of the said rent and arrears.

The defendant insisted (*inter alia*) upon the [100] above grounds, and upon an usage in levying and getting in the said rent, of requiring the same from the several occupiers, &c. and of distraining only on the lands out of which the rent issued, and for so much only on any one tenement as the same was in arrear for the rent reserved thereon. The defendant stated, he believed it had been usual for the bailiff or steward of the manor for the time being, to collect the several quit rents thereof, and to pay the same from time to time to the agent or receiver of the plaintiff; and if the tenants, liable to pay their share of the

said rents, refused or neglected so to do, the defendant insisted such bailiff or steward informed such agent or receiver for the plaintiff thereof, who thereupon granted a warrant to such bailiff, &c. to levy such arrears or rents unpaid from such several persons with respect to their several estates or possessions, and that thereupon such bailiff distrained accordingly.

The Court declared, "that the plaintiff was entitled to the said rent of 36*l.* 16*s.* 8½*d.* as one entire fee-farm rent, issuing and payable out of the said manor of L. N. in the county of Cardigan; and that the several ancient quit rents and chief rents payable by the tenants of the said manor, passed by a grant of his late Majesty King *Charles* the First (stated in the answer) to *E. D. &c.* And that the said defendant, as claiming under them, was entitled to the said ancient quit rents, and chief rents, and to distrain for

the same on the tenants of the lands liable there-
[101] to." The Master was to take an account of the arrears due from the defendant to the plaintiff, in which he was to make an allowance for the land-tax, pursuant to the several acts of parliament relating thereto, &c. And it was ordered that the defendant should pay unto the plaintiff what should be found due on the balance of the said account; and that he should, so long as he should be seized of the said manor, continue to make the growing payments of the said fee-farm rent of, &c. to the plaintiff, annually; and that he should pay the plaintiff the costs of the suit. *Reg. Lib.*

The case cited p. 173, is *Cook v. Smee*, 2 *Bro. P. C.* 184, octavo edit.

LLOYD *versus* BALDWIN, Dec. 9, 1748.

(*Reg. Lib.* 1748. *A. fol.* 85, entered "*Lloyd v. Garth.*")

VOL. I. page 173.—Purchaser or mortgagee under a decree for sale or mortgage and payment of creditors, answerable for the application of the money, if not paid into Court.

NOTES AND OBSERVATIONS.

THE estate was mortgaged to *Edward Turnour*, the representative of whose devisee in trust, together with his infant son (the *cestui que* trust,) were now before the Court as defendants. The former, after having urged that the estate was not liable; or, if it was, that *E. T.*'s personal estate was more than sufficient to answer the plaintiff's demands, insisted upon the presumption of payment of the plaintiff's demands out of the money paid by *Turnour*; and likewise insisted upon the statute of limitations. The Court, after directing the Master to carry on the account of subsequent interest upon the plain- [102] tiff's demands, and to tax their costs of the suit, ordered, that upon payment by the defendants, the representatives, &c. or by the defendant the infant, of what should be found due to the plaintiff for such principal, interest, and costs, at such time, &c. within six months, &c. the plaintiffs should assign to the defendants, or, &c. their several debts and incumbrances, &c. &c. but in default of such payment, then the estate in question, or a sufficient part thereof, should be sold, &c. and the money arising from such sale paid into Court; and reserved further directions. And the decree was to be without prejudice to any remedy or relief the defendants, the devisees and trustees of *E. T.* might be entitled to against the representatives of the personal estate, or against the defendant *E. B.* the heir at law of *J. B.* (to whom the money had been paid) to be reimbursed and indemnified in respect of what they should so pay, or of what should be raised out of the estate in question, for satisfaction of the plaintiff's demands. *Reg. Lib.*

CUNNINGHAM *versus* MOODY, Dec. 10, 1748.

(*Reg. Lib.* 1748. *A. fol.* 150.)

VOL. I. page 174.—Lord *Eldon*'s act.

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NOTES AND OBSERVATIONS.

As to this case, vide *per* Lord Loughborough, C. 2 *Ves. jun.* 707.

Edwards v. Lady Warwick, cited p. 175, is in 2 *P. W.* 171.

[103] Lord Conway's case, cited *ibid.* is *Walpole v. Lord Conway*, *Barn. Ch. Rep.* 153. It is also stated *arguendo* 1 *Ves.* 259, *et per* Lord Chancellor, 261. Vide also 2 *Ves. jun.* 707.

As to the point in page 176, where money was to be considered as land with reference to tenant in tail, see the attestation in the law, made by statute 40 *Geo. III. c.* 56 ; called Lord Eldon's act ; which prevents the necessity of an actual investment, where, if it had been made, the party might have suffered a recovery of the land. As to the mode of executing its provisions, see 5 *Ves. note.* *Ex parte Hodges*, 1 *Ves.* 576. *Ex parte Frith*, 8 *Ves.* 609.

OGLE *versus* COOK, December 10, 1748.

(*Reg. Lib.* 1748. *B. fol.* 22.)

VOL. I. page 177.—In a suit to establish a will in equity, all the witnesses to it should be examined, or proof given of their deaths.(1)

NOTES AND OBSERVATIONS.

(1) VIDE the notes on *Grayson v. Atkinson*, 2 *Ves.* 454, *postea* ; () and note, that although in a mere action at law on a will, the Courts there are content with the examination of any one of the witnesses ; the case is different in the trial of an issue there ; for all the witnesses must be examined under it, or proof given of their deaths. Vide *Bootle v. Blundell*, 1 *Coop. Ch. Rep.* 136.

WILLET *versus* SANDFORD, Dec, 12, 1748.

(*Reg. Lib.* 1748. *B. fol.* 529, entered "*Willet v. Wyndowe.*")

VOL. I. page 178 and 186.—Devise before the Mortmain act,(1) and a codicil after it, not disturbing the charitable trust, but devising to the same use, and adding two more trustees, is not rendered void, although the codicil attempted to unite another piece of land in the trust.(2)

Revocation.

NOTES AND OBSERVATIONS.

(1) SEE 1 *Ves.* 36, and 225.

(2) The will and codicil were established, and the trusts thereof directed to be performed, "except as to this piece of land; as to which it was declared, that the devise in the said codicil for the benefit of the said charity was void." *R. L.*

Lord *Lincoln's* case, cited p. 178, is in 1 *Eq. Ca. Abr.* 411. *Onions v. Tyrer*, cited p. 179, is in 1 *P. W.* 343.

As to cases where an instrument, though incompetent to pass an interest, may amount to a revocation, as noticed at the bottom of p. 178. See the solemn judgment of Lord *Eldon*, C. in the *Earl of Ilchester's* case, 7 *Ves.* 370, &c.

WHARAM *versus* BROUGHTON.

VOL. I. page 186.—Bill pro confesso.

NOTES AND OBSERVATIONS.

A BILL of revivor was subsequently filed, agreeably to Lord *Hardwicke's* suggestion. An order was made on the 1st of February, 1749, that the defendant *Broughton* should appear on the ensuing 1st of March, grounded on an affidavit, "that, upon inquiring at his usual place of abode, he could not be found, so as to be served and that he absconded to avoid being served." [105]
Reg. Lib. 1748, *B. fol.* 98.

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On the 11th of March ensuing, *Steele's* exceptions were over-ruled, and he was ordered to pay the several sums reported due from him, &c. to the plaintiff, towards the satisfaction of the duty and costs decreed to her testator. *Reg. Lib.* 1748. *B. fol.* 185.

As to the decrees, *pro confesso*, see *Geary v. Sheridan*, 8 *Ves.* 192.

HUGHES *versus* TRUSTEES OF MORDEN COLLEGE,

December 20, 1748.

(*Reg. Lib.* 1748. *A. fol.* 78, entered "*Huges v. Brand.*")

VOL. I. page 188.—Garden grounds used for trade as much protected by the highway acts, &c. as private gardens. Plaintiff, therefore, quieted in possession by injunction against the commissioners.

NOTES AND OBSERVATIONS.

THE plaintiff was a gardener by trade, and had added the garden ground in question, consisting of 3 acres and a half, to 7 acres which he occupied as garden ground, adjoining to it.

The defendants, the Commissioners, insisted, "that the plaintiff's ground was not within the exception of the acts of Parliament, which [they alleged] applied only to house-gardens, orchards, &c. or meadows, planted walks, or avenues to a house."

An injunction was awarded "to quiet the plaintiff in such possession of the premises in question as he had at the time of filing his amended bill, and for three years before; which was to continue until the hearing of the cause."
Reg. Lib.

HAWKINS *versus* DAY, Dec. 21, 1748.

(Reg. Lib. 1748. A. fol. 115.)

VOL. I. page 189.—Confirmation of Master's report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous exceptions had been disallowed after argument.

NOTES AND OBSERVATIONS.

NOTWITHSTANDING the first impression of the Court, as stated in the report, it appears that Lord *Hardwicke* at length, "Declared, that he was of opinion it was reasonable, under the circumstances of the lease, that upon the terms thereafter mentioned, the petitioner, the defendants *J. Day*, and *M.* his wife, should have liberty to re-argue the exceptions formerly taken to the said Master's report, mentioned in the petition, and to take new exceptions to the said report relating to the matters complained of in the petition, to come on to be argued at the same time. But the counsel for the plaintiff desiring for the sake of dispatch to avoid such circuitry, and the delay and expense that would be occasioned thereby, his Lordship ordered, 'that upon the said defendant *J. D's* giving his own recognisance within a fortnight from that time, in the penalty of 2000*l.* with condition to pay such sum of money, if any, as should, be found due from him upon the balance of the account, directed by the decree to such of the parties to whom the same should be found due, together with interest for the same from that day, at the rate of 4 *per cent. per annum*, in such manner as the Court should direct, and paying to the plaintiffs such costs as they had been put to by taking out the said Mas- [107] ter's last report, so far as the same related to the account of the personal estate, and the administration thereof, and the costs subsequent thereto, so far as the same related, &c.; and the costs of that application to the

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Court, &c. within a week after the taxation, or settling thereof: that the confirmation of the said report should be so far opened as related to the said account of such personal estate, and the administration thereof; and that it should be referred back to the Master, to review that part of the said report. And it was further ordered, that the Master should speed his subsequent report, and that the parties should attend *de die in diem* for that purpose." *Reg. Lib.*

• PARSON *versus* LANOE, Jan. 28, 1748-9.

(*Reg. Lib.* 1748. *B. fol.* 471.)

VOL. I. page 189.—S. C. Amb. 557. Will on a contingency. Devise in case of testator dying before his return from Ireland. Having returned, &c. the disposition ineffectual. (1) Revocation by marriage, and birth of children. (2)

NOTES AND OBSERVATIONS.

(1) VIDE *Sinclair v. Howe*, 6 *Ves.* 607.

(2) Though Lord *Hardwicke*, at the bottom of p. 191, refers to the existence of doubts as to whether marriage and the birth of a child operated as a revocation of a will, it was considered to be law that it would, in *Brown v. Thompson*, 1 *Eq. Ab.* 413; which rule was not contravened, although the decree there was reversed under the particular circumstances. See 1 *P. W.* 304, notes; (4) et vide 1 *Ves. B.* 397.

Notwithstanding the presumption seemed to apply equally strong to real estate as to personal,
[108] and especially when the observation of Lord K. *Wright* in *Brown v. Thompson* (on appeal 1 *P. W.* 304, 305) is attended to, viz.: "that the statute of frauds and perjuries does not extend to implied revocations;" it was never absolutely determined till the case of *Christopher v. Christopher*, in the Exchequer, July 6,

1771. See 4 *Burr.* 2171, 2182. *Dougl.* 35, when it was adjudged in the affirmative. See the various cases up to the year 1778, collated in *Brady v. Cubitt*, *Dougl.* 31; and those subsequently in the *E. of Ilchester's* case, 7 *Ves.* 348, &c. and 1 *Vesey & Beames*, 397, &c.

It seems, therefore, to be now quite settled, as a general rule, that marriage, and the birth of a child, will presumptively revoke a disposition by will, and that the exceptions serve but to confirm it.

Vide Mr. *Cox's* note above referred to, 1 *P. W.* 304, note (4) last edit. &c. The *E. of Ilchester's* case, 7 *Ves.* 348. *Sheath v. York*, 1 *Ves.* and *B.* 390, 397, &c. Et per Lord *Eldon*, *C. ibid.* 465.

In the principal case the bill was dismissed without costs, the plaintiff having declined the Court's proposal to try the validity of the will at law. *R. L.*

LEGARD *versus* DALY, *Jan.* 28, 1748-9. [109]

(*Reg. Lib.* 1748. *B. fol.* 111, entered "*Legard v. Lord Mountjoy.*")

VOL. I. page 192.—No new trial where there must be the same issues, and no surprise, &c. on the former trial. Infancy no ground for it in such a case. Verdict, founded on evidence discovered since the answer put in, and contrary to it, is not thereby prejudiced. Length of time, on an application for a new trial, a very great objection, both at law and in equity.

NOTES AND OBSERVATIONS.

Stapilton v. Stapilton, cited p. 194, is in 1 *Ath.* 2-5.

JENNER *versus* WILKINS, *Feb.* 4, 1749.

(*Reg. Lib.* 1748. *A. fol.* 325.)

VOL. I. page 195.—Suspicious assignments for the family of insolvent debtor.

NOTES AND OBSERVATIONS.

THE Master was directed to inquire whether the assignment made by the sheriff to *J. T.* and the subsequent assignments made of the estate comprised in the assignment from the sheriff, or any of them, were made *bona fide*, and for a valuable consideration, and what was the consideration of such assignments respectively; or whether the said assignments, or any of them, was or were made in trust, or for the benefit of the defendant *R. B.* the insolvent debtor; or whether the said defendant *R. B.* or any other person for his benefit, was in possession of the said estate; and the Master was to state the same, and all circumstances materially relating thereto, with this opinion thereupon, to the Court. *Reg. Lib.*

[110] *WYTH versus BLACKMAN, Feb. 7, 1749.*

(*Reg. Lib. 1748. B. fol. 459.*)

VOL. I. page 196.—S. C. Amb. 555. Deed, construction of, grandchildren and great-grandchildren included by the term “issue;” and the word “children” following it, explained as meaning “issue” likewise.

Furniture, &c. at H. bequeathed for the use of those who should enjoy the estate, to be taken care of and delivered by executors, and to remain at H. as if in his own possession; vests in the first tenant for life.

NOTES AND OBSERVATIONS.

THE case mentioned at p. 197, as in December, 1742, was that of *Heneage v. Hemlocke*, 2 *Atk.* 456.

Clare v. Clare, cited from *Forr.* p. 198, is considered as overruled, and particularly by *Sabbarton v. Sabbarton*, *Forr.* 245; and it is now settled, that a bequest, after a contingent limitation, *quasi* in tail, which does not take effect, is good. See *Phipps v. Lord Mulgrave*, 3 *Ves* 613.

Gower v. Grosvenor, cited also p. 198, is in *Barn. Ch.*

Rep. 54. *Roper v. Ratcliff*, cited p. 199, is in 5 *Bro. P. C.* octavo edit.

As to the doctrine stated p. 200, of the word "issue" by itself taking in all issue, *ad infinitum*, see *Horsepool v. Watson*, 3 *Ves.* 383; *Davenport v. Hanbury*, *ibid.* 257; *Royle v. Hamilton*, 4 *Ves.* 437; *Reeves v. Brymer*, *ibid.* 692; *Radcliffe v. Buckley*, 10 *Ves.* 195.

As to *Higgins v. Downes*, observed on by Lord *Hardwicke*, towards the end of his judgment, p. 202, see the case, with Mr. *Cox's* note, 1 *P. W.* 98.

In the principal case the bill was dismissed, so far alone as related to the furniture and household stuff. The decree, in other respects, was (*inter alia*) for a sale of the estate, and division of the proceeds, agreeably to the former part of the judgment.

E. OF DERBY *versus* D. OF ATHOL, [111]
February 8, 1749.

(*Reg. Lib.* 1748. *B. fol.* 236.)

VOL. I. page 202.—S. C. 1 *Dick.* 129. On a plea to the jurisdiction, it must be shown what other Court has it. (1)
Demurrer, if good to relief, will extend to the discovery also. (2)
Demurrer either allowed, or over-ruled in toto.

NOTES AND OBSERVATIONS.

(1) SEE also 1 *Ves. jun.* 372, &c.

Attorney General v. Talbot, cited p. 204, is at 1 *Ves.* 78; vide also on the point, *Green v. Rutherford*, *ibid.* 462.

As to what Lord *Hardwicke* observes, p. 205, that a plea might be good as to either discovery, or relief, and bad as to the other, the rule seems now quite settled to be otherwise. It is now beyond a doubt, that although a plaintiff, bringing his bill both for discovery and relief, may be entitled, in point of equity, to a discovery, a demurrer will

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nevertheless be allowed to the whole bill, if he is not entitled to the relief; for he ought to shape his bill according to the justice of his case; and if his bill had been merely for a discovery, he would have paid the costs of it forthwith, after it was given; *Price v. James*, 2 Bro. 319. *Collis v. Swayne*, 4 Bro. 480; et vide 3 Ves. 347; 6 Ves. 63, 686; 8 Ves. 2. *Sutton v. E. Scarborough*, 9 Ves. 71, 75. *Baker v. Mellish*, 10 Ves. 544. The case of *Fry v. Penn*, therefore, 2 Bro. 280, previously to these decisions, is not law.

This rule, however, does not preclude a defendant from answering to the discovery, though he demur to the relief.

Hodgkin v. Longden, 8 Ves. 2.

[112] As to Lord *Hardwicke's* concluding observation, see 1 *Atk.* 451, and the references by Mr. *Sander's*, 2 *Atk.* 44, 284, 389; also 2 Ves. 110, 357.

KEMP *versus* SQUIRE, February 10, 1749.

(*Reg. Lib.* 1748. *A.* fol. 193.)

VOL. I. page 205.—S. C. 1 Dick. 131. Inrollment of decree set aside under circumstances. (1) Not, however, if made upon the merits. (2)

NOTES AND OBSERVATIONS.

(1) VIDE also 1 Ves. 326, which is S. C. with 409 *ibid.* and *Pickett v. Loggan*, 5 Ves. 702.

(2) Vide *Charman v. Charman*, 16 Ves. 114.

Robson v. Cranwell, cited p. 205, is in 1 Dick. 61. *Benson v. Vernon*, cited p. 206, is in 3 Bro. P. C. 626, octavo ed.

MEDLICOT *versus* BOWES, Feb. 22, 1749.

(*Reg. Lib.* 1748. *B.* fol. 209.)

VOL. I. page 207.—Testator “desires” J. “to leave” D. 500*l.* at her death, out of the money bequeathed her; held to amount

to a legacy from the original testator; and not to lapse by *D.*'s death in *J.*'s lifetime, he having survived the testator.(1)
No set-off therefore allowed on a demand of the estate of *J.* on that of *D.*; being in *auter droit*.

NOTES AND OBSERVATIONS.

(1) SEE 2 *Ves.* jun. 533, 529.

The bill seems to have been skilfully framed, precisely upon the principle of the determination; namely, that the gift was from the original testator. It stated, that *D. B.* "thereby gave to *D.* a legacy, in the words, or to the effect, following," &c.

The answer, though acknowledging some items to be unliquidated, affirmed an account to have been stated, and a balance admitted by *D.* &c. &c.

The defendant was ordered to pay the costs of [113] the suit. *R. L.*

EMPEROR *versus* ROLFE, *Feb.* 24, 1749.

(*Reg. Lib.* 1748. *A. fol.* 693.)

VOL. I. page 208.

COLEMAL *versus* SEYMOUR, *Feb.* 24, 1749.

(*Reg. Lib.* 1748. *A. fol.* 432. entered "*Coleman v. Coleman.*")

VOL. I. page 209.—Bequest of 3000*l.* to Jane, the wife of *C.* for the use of her younger children, to be distributed as she should appoint; in default, equally. All Jane's children by *C.* being born at the time of the will and death of testator, it was held vested as a present legacy to them, subject to variation as between them; but not to extend to her children by a future marriage. The period of vesting being as above, one who was a younger child at the testator's death, and became an elder afterwards, was held entitled. Interest on legacies from the end of one year from the death of testator; except as between parent and child.(2)

In the principal case, the legacies being vested, the interest allowed for maintenance, equally subject to the mother's reasonable variation.

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NOTES AND OBSERVATIONS.

As to the points in this case,

Vide 1 *Ves.* 57, 59. *Hill v. Chapman*, 1 *Ves.* jun. 405, and 2 *Bro.* 390. *Heneage v. Hunloke*, 2 *Atk.* 456. *Lady Lincoln v. Pelham*, 10 *Ves.* 166. *Bowles v. Bowles*, *ibid.* 177. *Smith v. Lord Camelford*, 2 *Ves.* jun. 698; and *Crickett v. Dalby*, 3 *Ves.* 10.

(2) Vide *Sitwell v. Bernard*, 6 *Ves.* 520.

[114] MARTIN *versus* MARTIN.

VOL. I. page 211.—Injunction against creditors suing at law after a decree to account.(2)

NOTES AND OBSERVATIONS.

Morrice v. Bank of England, cited p. 212 and 213, is in 3 *P. W.* 402, n. and 2 *Bro. P. C.* 465, actavo edit. where it is remarkably well reported. See 10 *Ves.* 37, 38.

(2) See *Schoales & Lefroy's Reports*, 299, and note (b); *Rush v. Higgs*, 4 *Ves.* 638; and *Perry v. Phelps*, 10 *Ves.* 34, 39; from which last it appears, that a mere decree for an account of plaintiff's demand, and payment of the result, is not sufficient to prevent an executor paying a judgment: for which purpose there should be a report and a final decree.

ITHELL *versus* BEANE, February 28, 1749.

(*Reg. Lib.* 1748. *A. fol.* 708.)

VOL. I. page 215.—S. C. 1 Dick. 132. Devise of all testator's "real" and personal estate(1) "subject to debts" affects copyhold lands unsurrendered, for the benefit of the creditors, there being no freehold lands. If there had been, it would have been otherwise.

No preference allowed to a creditor who became a mortgagee under the devisee in trust.

In marriage settlements, &c. on good or valuable consideration, as between the immediate "parties," such consideration will run through all the limitations for the benefit of the remotest persons; even of those in respect of whom the deeds would, otherwise, have been voluntary. (2)

NOTES AND OBSERVATIONS.

THE testator devised "all the residue of his real and personal estate to the son, to hold to him, his heirs, executors, &c. for ever, and appointed him sole executor." *R. L.*

(1) Vide *Rose v. Bartlett*, *Cro. Car.* 292, and *Watkins v. Lea*, 6 *Ves.* 633, and the cases therein referred to; et vide *Goodwyn v. Goodwyn*, 1 *Ves.* 226, *et postea.* (117)

(2) Vide *Stephens v. Trueman*, 1 *Ves.* 73, 74, *et antea.* (53)

JACKSON *versus* JACKSON, March 1, 1749. [115]

(*Reg. Lib.* 1748. *A. fol.* 402.)

VOL. I. page 217.—Construction of will; "and" construed "or." Vested legacy. Bequest of 400*l.* to *R.* to be paid in a year; and of a further sum of 100*l.* at the death of his mother; the latter held also a vested legacy.

NOTES AND OBSERVATIONS.

THE bill was filed by the only son of *R.* and insisted, that the latter clause, "but if my son *R.* should die in the life of my wife, without leaving issue male," amounted, under the circumstances, to a devise to the plaintiff by implication. It is to be observed, that *William*, by his answer, disclaimed any title to the premises. *R. L.*

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ATTORNEY GENERAL versus DAY,

March 1. 1748-9.

(2 L. 118. 2d fol. 276.)

The Court refused to effectuate an order, for laying out money in land, for the purchase of a devise, on which it was intended to evade the statute of mortmain. The defendant persists in refusing to execute, and the succeeding tenant in fee simple, takes paramount, *per formam* of the decree might have been decreed, as to the tenants in common, yet the decree is to one moiety, the other moiety is to the other; the consideration of half of it inadequate to

OBSERVATIONS.

The case of *W. Smith*, cited p. 219, is in the Master's express as to the confirmation of such contracts are incomplete, and before confirmation, will fall. Ex parte

R. L.

ATTORNEY GENERAL versus ANDREWS,

March 1. 1748-9.

(2 L. 118. 2d fol. 276.)

The Court before the statute of mortmain, held good. Copyholds were not affected by the statute. As to where the Courts have jurisdiction, and donations for charitable purposes.

NOTES AND OBSERVATIONS.

(1) THE will had no subscribing witness to it. *R. L.*

As to this point, see 2 *Ves. jun.* 232.

The best report of *Tuffnell v. Page* is in *Barnadiston's Ch. Rep.* 9; although, in most cases, that reporter is very inferior, and often inaccurate. It is also reported 2 *Ath.* 37.

With regard to Lord *Hardwicke's* observations, page 226, as to dispensing with a recovery on entailed lands given to a charity before the Statute of Mortmain, see *Attorney General v. Rye and Warwick*, 2 *Vern.* 453, and some cases cited in it.

As to different cases, wherein valid charitable dispositions are favoured, see 1 *Gwillim's Bac. Abr.* 582, *et sequent.*

In the principal case, the Court declared, that the testator's will ought to be established as to all the copyhold lands and estate, whether surrendered or not, to the use of the will, &c. &c.; and that the relators ought to be admitted in the respective Courts of the manors whereof the said copyhold lands were parcel, according to the devise of the testator's will, as trustees of the charity therein mentioned, on payment of the several fines, &c. &c.

GOODWYN *versus* GOODWYN, [117]

March 11, 1748-9.

(*Reg. Lib.* 1748. *A. fol.* 673.)

VOL. I. page 226.—Devise of “all messuages, lands, &c.” will pass copyholds, where the introductory words show testator's intent to dispose of all his estate.”

After-born children included in a devise to “A.'s children.” Satisfaction. What passes by the word “estates, &c.” either alone, or with the addition of other words.(1)

NOTES AND OBSERVATIONS.

(1) SEE *Ithell v. Beane*, 1 *Ves.* 215, *et antea* (114) and the note there. The word "estate" naturally signifies the interest, rather than the subject. See in *Barry v. Edgworth*, 2 *P. W.* 524, and many of the cases collected in Mr. Cox's edit. p. 525; also *Pettiwood v. Prescott*, 7 *Ves.* 541, &c. with *Roe dem. Child v. Wright*, 7 *East*, (259).

Ibbetson v. Beekwith, cited p. 227, is in *Forr.* 157. *Tuffnell v. Page*, cited 228, is well reported. *Barn. Ch.* 9.

The observation towards the end of the report, that the word plural "estates," in common parlance, means "a description of the lands," has not always been acceded to. See *Fletcher v. Smiton*, 2 *T. R.* 656.

In the principal case it was (*inter alia*) declared "that, after the death of *Thomas*, *Elizabeth* was entitled to the whole rents and profits of the freehold lands of the said *Henry Framington*, lying in *Tring* and *Sedgford*, in the county of *Norfolk*; and also entitled, in her own right, to one-third part of the rents and profits of the copyhold lands in *Sedgford*; and also to one-third part of the said copyhold lands, under the will of the said *Thomas* (the same belonging to him by virtue of the will of his father, Sir *Peter Seaman*, his sister *Joan* having accepted the legacy of 4000*l* given unto her by that will;) and that the said *Elizabeth* was also entitled to one-third part of the profits of the manor of *Tring*, in her own right. And as to the remaining third part of the rents and profits of the said copyhold lands, it appearing that the defendant *Elizabeth* was entitled to one moiety of such rents and profits in her own right; but a question arising in the cause, whether the remaining moiety of such third part, that is to say, one-sixth part of the whole copyhold lands passed by the will of the said *Thomas*, he not having surrendered the same to the use of his

will ;" it was ordered, that one of such moieties should be appropriated or paid as the share of *Elizabeth*; "and as to the other moiety of the last mentioned third part of the said rents and profits, that is to say, one-sixth part of the whole rents and profits of the said copyhold lands, it was further ordered, that the said Master should inquire, whether *Joan Seaman*, afterwards *Dame Joan Nelthorpe*, or *Sir Henry Nelthorpe* in her right, did, in her life time, submit to the will of the said *Thomas Seaman*, or accept any benefit thereby," &c.

The Court reserving further directions as to the payment thereof. *Reg. Lib.*

TAYLOR *versus* PHILIPS, April 13, 1749. [119]

(*Reg. Lib.* 1748. B. fol. 501.)

VOL. I. page 229.—As to whether a surrender of copyholds by a feme covert alone is good, her husband having been present at the time.

NOTES AND OBSERVATIONS.

It is to be observed, that the will was made with the actual privity and consent of the husband.

It ought to be noticed, that there is a defect in the argument urged in favour of the devise, page 229 ; where, abandoning the immediate effect of the surrender, it is referred to take effect after the wife's death. It was adjudged upon several precedents in *Sympson v. Sothern, Cro. Jac.* 376, that, without an express custom, a copyholder in fee cannot surrender "*habendum after his death*," any more than a tenant in fee can convey *habend'* after his death. *Bulstr.* 272, 273, *S. C.* *Rolle Rep.* 109, 137, 253, *S. C.* *Godb.* 264, *S. C.* See 2 *Roll.* 791, 792. Vide *Rol. Ab.* 828. A copyholder, however, may do so by a particular custom : since even a freehold may, by custom, be surrendered without livery. *Co. Litt.* 490. *Peryman's case, ibid.* note (6).

In the principal case, the Court ordered the bill to be retained for twelve months, with liberty in the mean time for the plaintiff (the infant heir at law of the wife) to bring an ejectment; but if he should not proceed to trial of such ejectment within that time, then his bill, as to these copyhold lands, was to stand dismissed with costs; and if the plaintiff should proceed, &c. then the defendants were to admit the pedigree of the plaintiff, and of *Jane*, [120] late wife of the defendant *Phillips*, [the testator] as the same was admitted by the answer of the defendant, Sir *N. E.* [the devisee.] *Reg. Lib.*

It appears from the registrar's book of the next year, that a petition was presented on behalf of the plaintiff, the infant, stating the above matters, and that the plaintiff had delivered ejectments accordingly, but that the defendant, Sir *N. E.* being elderly and unmarried, and the plaintiff being his heir at law, had proposed to surrender the premises to the use of himself for life, and after his death, to the use of the infant and his heirs, on condition that the said surrender was to be void on the said infant's attaining 21, if he then, or his heir, in case of his death, should not accept of the proposal, and should disagree to such surrender: and that the plaintiff was advised it was for his benefit to accept of such proposal; and therefore praying a reference to the Master, as to whether it would be for his interest and benefit to accept of such proposal; whereupon, and upon the consent of the defendants, it was referred to the Master "to examine into the proposal of the said Sir *N. E.* and consider whether the same was reasonable, and for the benefit of the said infant to have it carried into execution;" which the Master was to state, with his opinion thereupon, to the Court. *Reg. Lib.* 1749. *B. fol.* 191.

On the 17th of November following, upon the cause coming on upon the Master's report, the Court ordered it to be confirmed, and the proposal therein stated to be car-

ried into execution, with the following variation: "That the surrender to be made by the [121] said Sir *N. E.* be made to the uses therein mentioned, on condition that *J. T.* the infant, do, when he shall attain his age of 21 years, confirm the estate for life; to be limited to Sir *N. E.* by the surrender to be made of the copyhold premises; and this order is to be without prejudice to the plaintiff, the infant, after he shall attain his age of 21 years." *R. L. Ibid.* 606.

A *feme covert*, seised of copyhold lands in tail, according to custom, may, being solely examined by the steward, surrender them to him, to his use; for it is, nevertheless, to the use of the lord, whose servant he is. *Erish v. Rives, Cro. Eliz.* 717.

Upon the point of the above principal case, see *Compton v. Collinson*, in *C. P.* 1 *H. Bl.* 342, where the Court determined, that a married woman living apart from her husband under articles of separation, by which (*inter alia*) he covenanted to join in all necessary conveyances, and in surrendering the copyholds as she should appoint, could surrender the copyholds without the husband's joining, and without a special custom for the purpose; for that the wife was tenant, and not the husband; and that the estate could be forfeited or surrendered only by her acts, not by his. The Court, indeed, added, "that the authority which he acquires by his marital rights, to direct and control her acts, was, by his covenant, in the present instance, annulled, or at least suspended." But the judgment was necessarily founded upon the doctrine above cited, abstractedly from the covenant; since that required him to join in all necessary conveyances and surrenders, whereas, from what appears before [122] his joining, was held unnecessary. This case, therefore, has shaken the opinion stated in *Stevens v. Tyrrell, 2 Wils.* 1, "that a custom for a *feme covert* to surrender without the assent of her husband is bad."

AYRES *versus* WILLIS, *April 17, 1749.*

(*Reg. Lib.* 1748. *A. fol.* 585, entered "*Ayres v. Carte.*")

VOL. I. page 230.—Devise of the residue of personal estate to wife, no bar of dower by implication.(1)

NOTES AND OBSERVATIONS.

(1) VIDE *Walker v. Walker*, 1 *Ves.* 54, 55, *et antea* (43) and the note there. Also *French v. Davies*, 2 *Ves. jun.* 572. *Strahan v. Sutton*, 3 *Ves.* 249.

GOODINGE *versus* GOODINGE, *April 24, 1749.*

(*Reg. Lib.* 1748. *A. fol.* 619.)

VOL. I. page 231.—Bequest to such of nearest relations, as A. should think poor, and objects of charity, confined to those within the statute of distributions, under A's advice.

NOTES AND OBSERVATIONS.

THE words of the bequest were, "2000*l.* to such of his nearest relations, of the family of the *Edges*, as they should think the greatest objects of charity, in such manner and proportions as they, or the survivor, &c. should think fit;" and desired them "to take the advice and direction of his sister *Salisbury* in the distribution thereof, if she should be living."

[123] It is to be observed, that he had, in a former part of his will, given Mrs. *Salisbury*, the interest of 1000*l.* old South Sea annuities for life. She stated by her answer, that she was the testator's only sister, and next of kin; and after having mentioned several persons who were the testator's first cousins, as being very poor and deserving of shares, and those for whom the testator intended to make a provision, &c.; and submitting her opinion concerning the distribution to the Court; she hoped, that if the Court should think the first cousins not

entitled, it would consider the value of her legacy, and take care of her interest and share in the 2000*l.*; and she believed her legacy was not worth 300*l.* ready money, and her annuity was not worth seven years purchase, she being 70 years of age. It was, however, held, that Mrs. *Salisbury* was excluded from any share, by the dismissal of the bill.

In the other cause the Court declared, "that the next of kin of the said testator of the family of the *Edges*, who would have been entitled to distributive shares of his personal estates, within the statute for distribution, &c. in case he had died intestate, ought to be construed as meant and intended, by the description of nearest relations in the bequest in question; and that the defendants, the executors, with the advice of the defendant, Mrs. *Salisbury*, have the power of judgment, which of such persons are the greatest objects of charity; and that the said defendant, Mrs. *Salisbury*, is not to be considered as one of such objects of charity, within the intention of the said testator's will:" and decreed, that the [124] executors should, with the advice of the defendant, Mrs. *S.* lay before the Master a list of such of the testator's nearest relations, within the description before mentioned, as they judged to be the greatest objects of charity; and should also mention in such list the proportions in which they, with the advice of the defendant, Mrs. *S.* should think fit, that the 2000*l.* and interest, should be distributed amongst such persons: and in case any objection should be made before the Master, that the persons mentioned in such list, or any of them, were not of the next of kin of the testator within the description aforesaid, it was ordered, that the Master should inquire into and ascertain the same; and if the Master should find that they, or any of them, were not such persons, then the defendants, the executors, with the advice of the defendant, Mrs. *S.* were to propose other persons in their room: and

any of the testator's nearest relations, of the family of the *Edges*, within the description aforesaid, were to be at liberty to come before the Master to controvert whether any of the persons named by the executors in their list, were within the description before mentioned: and the defendants, the executors, having admitted assets, the Master was to compute interest on the said legacy of 2000*l.* from the end of one year, &c.: and the defendants, the executors, were to distribute and pay the said 2000*l.* and interest, amongst such persons as should be mentioned in such list, or finally ascertained by the Master to be within the said description, according to the directions aforesaid; and the defendants, the executors, were [125] to produce receipts before the Master of such payments. And in case any of the persons who should, by virtue of the decree and the directions aforesaid, be entitled to any share of the said 2000*l.* and interest, should be married women, the Court reserved the consideration of any directions touching the payment thereof, till after the Master's report. *Reg. Lib.*

The general rule is, that under a devise to "relations," or "next of kin," those only can take, who would have taken under the statute of distribution, in case of intestacy; the shares and proportions, however, to be governed by the will. And it appears from the cases, that the words "poor" or "poorest," "near" or "nearest," preceding them, will not alter the construction; though the construction may be enlarged, when warranted by the intention appearing on the will, and not from parol evidence. See the cases collected and stated 1 *Roper on Legacies*, 115, 118, 120, &c. inclusive. See also *Pyot v. Pyot*, 1 *Ves.* 335, 337, *et post.* and *Whithorne v. Harris*, 2 *Ves.* 527, &c.

KING *versus* PHILIPS, May 6, 1749.

(*Reg. Lib.* 1748. *A. fol.* 413, entered "*King v. Newman.*")

VOL. I. page 232.—Legatee being a creditor under the testator her father's marriage articles, an account directed of testator's personal estate at the making of his will, and his death; the legacy being so near in value, that it might defeat the rest.

NOTES AND OBSERVATIONS.

THE plaintiff was the testator's only child, and a creditor under his marriage articles, whereby he covenanted to give to the children of the marriage (in the event which afterwards took place) by will or [126] otherwise, one full third part of his real and personal estate.

The words of the will are stated in *Reg. Lib.* as follows, *viz.*: "I will and desire that the agreement by me made and entered into upon my marriage with my late dearly beloved wife, *Jane King*, be punctually complied with and performed. *Item*, I give to my sister *E. P.*; my niece *M. R.*; *T. M.* and *S. T.* gent. the sum of 10,000*l.* of lawful money, &c. in trust, to lay out the same upon some government security, and pay the interest or dividends thereof for the education and maintenance of my daughter, *Mary King*, (the plaintiff) till she arrive at the age of 21 years; and upon her attaining her age of 21 years, I will that the same be transferred to my said daughter."

The testator also gave the general residue of his real and personal estate to the plaintiff, her heirs, executors, &c.

In the original suit the defendants submitted, "whether, since the testator had not left assets to answer the defendant's demands, and the several other legacies, the other legatees ought not to be parties thereto; that a complete decree might be made to settle the parties' rights, and the

appointment to be made in respect of the several legacies and the plaintiff's demands, and that the defendants might be indemnified against the demands of the several legatees, and a multiplicity of suits prevented." The legatees were not made parties to that suit, but a bill was filed [127] on their behalf, praying (*inter alia*) that *Mary King* might not take both under the settlement and will. The decree was made in both causes.

The Master was also to inquire what was the value of the testator's real estate to be sold, that was either descended to the plaintiff, the infant, or devised to her by the testator's will. *R. L.*

SAYER *versus* PIERSE, May 1, 1749.

(*Reg. Lib.* 1748. *B. fol.* 255.)

VOL. I. page 232.

NOTES AND OBSERVATIONS.

THE original bill, which had been filed about 20 years before the present hearing, prayed only for an account; the ascertainment of boundaries being introduced into a bill of revivor and supplement. The Court ordered the bill to be dismissed, so far as it sought an account, &c. before the time of filing the bill of revivor and supplement. As to the residue of the relief sought, the Court decreed as in the Rep. the defendant being restrained from setting up or making use of the time that had run since the filing of the bill of revivor and supplement, in order to support any defence under the statute of limitations in the ejectment. *R. L.*

COOKES *versus* HELLIER, May 3, 1749.

(Reg. Lib. 1748. A. fol. 657.)

VOL. I. page 234.—A person taking a benefit in personal or real estate, under a will, must abide by it in toto. Therefore an unsurrendered copyhold decreed to pass.(1)

NOTES AND OBSERVATIONS.

(1) VIDE *Allen v. Poulton*, 1 Ves. 121, 122, *et antea*, 76 and 77, note.

In the principal case the Court declared, [128] “that it appeared that Sir *Thomas Cookes Winfred* took the estate in question, and enjoyed the same under the will of Sir *T. C.* the first testator; and that the enfranchisement taken by the said Sir *T. C. W.* of the said premises, from, &c. enured not only for the benefit of himself, but of all persons entitled thereto in remainder under the will of Sir *T. C.*”

It therefore decreed, “that upon payment by the plaintiff to the defendant, in six months from that time, of the sum of 750*l.* being the consideration paid by the said Sir *T. C. W.* for such enfranchisement, the defendant should, at the expense of the plaintiff, convey the said premises, with the appurtenances, to the use of the plaintiff, and such other uses limited thereof by the will of the said Sir *T. C.* as were then existing,” &c. *R. L.*

PECK *versus* PARROT.

VOL. I. page 236.—Grant of personal estate by deed, to trustees, for a niece, after the death of the grantor, passes to her representatives, although the niece died in grantor's lifetime.(1) Voluntary gifts, &c.

NOTES AND OBSERVATIONS.

(1) SEE *Villers v. Beaumont*, 1 Vern. 100. *Allen v. Arne*, *ibid.* 365. *Bale v. Newton*, *ibid.* 464, and the

other cases cited in the note to *Villers v. Beaumont*, p. 101.

That voluntary gifts must amount to a complete conveyance or transfer at law of the property, see 1 *Ves.* jun. 54, et vide 12 *Ves.* 46; a bill, therefore, for an assignment of subscription receipts, with an indorsement, signed by the owner, declaring that he thereby assigned to his [129] daughter, the plaintiff, all his interest, was dismissed; there being no evidence that he ever parted with the paper, which was found amongst the papers of his executrix. *Antrobus v. Smith*, 12 *Ves.* 39. See *Williamson v. Codrington*, 1 *Ves.* 511, 514, et postea, and the note.

As to deeds and contracts, not voluntary, conveying or agreeing to settle all the grantor's personal estate (vide per Lord *Hardwicke*, p. 237.) See *Randall v. Willis*, 5 *Ves.* 262, and the cases cited. *Jones v. Martin*, 3 *Anstruth.* 881, and more fully 5 *Ves.* 266, note. Et vide *Lewis v. Madocks*, 8 *Ves.* 150, 156, 157, &c.

ROBERTS *versus* KINGSLEY, May 5, 1749.

(*Reg. Lib.* 1748. *B. fol.* 237.)

VOL. I. page 238.—Mistake—Election—Satisfaction—Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles *verbatim*, and both made before marriage. The plaintiff, however, having taken a benefit under the will which he disputed, held to have made his election: and decreed to give up part of the settled estate in satisfaction.

NOTES AND OBSERVATIONS.

THE words of the decree are these: “but the plaintiff having taken a benefit by the devise in his father's will of the estate at S. and St. Peter's in the county of H. ought not to retain such devise, and at the same time be allowed to claim in contradiction to his said father's will.” Where-

fore it was referred to the Master "to allot a proper part of the estate comprised in the articles and settlement, of equal value, to be sold, to the money for which the said estate at S. and St. P. was sold under the former decree." *R. L.*

WEST *versus* SKIPP, May 5, 1749. [130]

(*Reg. Lib.* 1748. *B. fol.* 517.—And *Reg. Lib.* 1749. *B. fol.* 519.)

VOL. I. pages 239, and 456.—Partnership—Bankruptcy—Representatives of partner entitled to set off debts, and have all allowances before the separate creditors of the other can take his share: and they have a lien for such demands.(1)

NOTES AND OBSERVATIONS.

(1) THE law described by Lord *Hardwicke*, page 242, as between one partner and the separate creditors of another, or his representatives, has of late years been confirmed and elucidated. Vide (*inter alia*) *Taylor v. Fields*, 4 *Ves.* 396. *Ex parte Ruffin*, 6 *Ves.* 119, which is always mentioned as a leading case, and has been approved on frequent consideration. See 11 *Ves.* 4, 5. *Ex parte Williams*, 11 *Ves.* 3. See also, *ibid.* 83, 85, and *De Tastet v. Bordieu*, Mich. Term, 1805, &c. &c.

Ryal v. Rowles, frequently cited in the report, is in 1 *Ves.* 348, 375. In the principal case it was declared, that *Skipp* was entitled "to the same specific lien against the assignees as against the *Harwoods*;" and the bill, "so far as it sought to exclude *Skipp* from such property or specific lien, or to impeach the same, was dismissed. The former decree was ordered to be performed and carried into execution between *Skipp* and the assignees in like manner as the same ought to have been performed and carried into execution against the *Harwoods*, in case they had not become bankrupts: the Court reserving any directions as to the lien of the sisters, and as to any variations that

might be necessary to be made in the said former decree as between the assignees and the sisters. *Reg. Lib.*

See a subsequent stage of this cause, 1 *Ves.* 456, *et postea*.

E. I. COMPANY *versus* CAMPBELL,

Exchequer, June 7, 1749.

VOL. I. page 246.—Demurrer to information as subjecting defendant to pains and penalties. (1) A demurrer may be put in after a plea is overruled. (2)

NOTES AND OBSERVATIONS.

(1) SEE *E. I. Company v. Neave*, 5 *Ves.* 173.

(2) See *Baker v. Mellish*, 11 *Ves.* 68.

Omichund v. Barker, cited page 247, is in 1 *Atk.* 21.

OWEN *versus* GRIFFITH, June 10, 1749.

(*Reg. Lib.* 1748. *B. fol.* 294.)

VOL. I. page 250.

ROBINSON *versus* GEE, June 10, 1749.

(*Reg. Lib.* 1748. *B. fol.* 522, entered "*Robinson v. Osgood*.")

VOL. I. page 251.—Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. (1) Parol evidence of an agreement between the parties deemed inadmissible. Bond *ex turpi causa* delivered up. (2)

NOTES AND OBSERVATIONS.

(1) It appears from *R. L.* that *Osgood Gee* admitted "he joined in the mortgage not only as surety for his bro-

ther, but also for his own sake, and to prevent the remainder and intail from being barred or cut off, and to preserve the same to himself." At the same [132] time, however, he insisted, that he did not so do, in order that the same might come to him subject to the 1000*l.* at all events; nor was it agreed that the same should be paid thereout; but, on the contrary, that *Samuel* promised to re-pay the same in a year; and actually did re-pay 200*l.* part thereof; which (though it was afterwards borrowed again) he submitted was a manifest proof that the estate was not to come to him subject to the 1000*l.* in all events, &c. &c. &c.

(2) See in *Priest v. Parrot* 2 *Ves.* 160.

DOOR *versus* GEARY, June 12, 1749.

(*Reg. Lib.* 1748. *A. fol.* 484.)

VOL. I. page 255.—Legacy of stock, erroneous description.(1)
Satisfaction.

NOTES AND OBSERVATIONS.

(1) VIDE *Attorney General v. Pyke*, 1 *Atk.* 435, and 2 *Roper* on Legacies, 319, &c. See also *Selwood v. Mildmay*, 3 *Ves.* 306.

Purse v. Snaplin, cited p. 256, is reported 1 *Atk.* 414. *Pacey v. Knolls*, cited *ibid.* is in *Cro. Car.* 447, 473, and 1 *Jo.* 379.

In the principal case the bill was drawn in the alternative, *viz.* "either that the defendant might transfer the 700*l.* bank stock, and all the dividends thereof; or, in case the Court should be of opinion that the plaintiff was not entitled thereto, then that they might be paid the 500*l.* and interest," which the husband had bound himself to give the wife.

The decree declared, "that under all the cir- [133]
cumstances of the case, the plaintiffs were enti-

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bled to the 700*l.* capital bank stock, &c. by virtue of the will of the testator *N. G.*; but that the same ought to be deemed as a satisfaction for the 500*l.* mentioned in the condition of the bond."

WHITMEL *versus* FARREL, June 22, 1749.

(*Reg. Lib.* 1748. *B. fol.* 538.)

VOL. I. page 256.—No relief in equity where an action at law would not lie by reason of a substantial defect; such as a contingency not happening.

NOTES AND OBSERVATIONS.

It was likewise stated as a part of the consideration, "that the assignment of the lease should cease, and remain at the husband's disposal from the making of the settlement." *R. L.*

KIRKHAM *versus* SMITH, June 23, 1749.

(*Reg. Lib.* 1748. *A. fol.* 612.)

VOL. I. page 258.—S. C. Amb. 518.—Tenant in tail pays off an incumbrance, but takes no assignment: the remainder over, under the circumstances, subject to pay it to his representatives. (1) Election—Contribution. (2)

NOTES AND OBSERVATIONS.

(1) SEE *The Countess of Shrewsbury v. Earl of Shrewsbury*, 1 *Ves. jun.* 227. *Jones v. Morgan*, 1 *Bro.* 206, 218, and *Amsbury v. Brown*, 1 *Ves.* 477, and *Sargeson v. Sealey*, 2 *Atk.* 416, and the note.

Walpole v. Lord Conway, cited p. 259, is in *Barn. Rep. Ch.* 153. See 2 *Ves. jun.* 707.

Ingram v. Ingram, cited *ibid.* is in 2 *Atk.* 88. *Noys*

v. Mordaunt, cited p. 260, is in 2 *Vern.* 581.

Prec. Ch. 265. *Gilb. Eq. Rep.* 2. Vide 2 *Rop.* [134] on *Leg.* 404.

(2) As to contribution, see *Lloyd v. Johnes*, 9 *Ves.* 37.

GRAHAM versus GRAHAM, June 26, 1749.

(*Reg. Lib.* 1748. *A. fol.* 678.)

VOL. I. page 262.—Dower. Satisfaction. Court in taking general accounts, making an allowance to widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them. If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. Contra, where he is not a general debtor for both.

ASTON versus ASTON, June 27, 1749.

(*Reg. Lib.* 1748. *A. fol.* 702.)

VOL. I. page 264.—The Court will restrain tenants for life without impeachment of waste to a reasonable exercise of their right.(1)

Owner of a charge not to be presumed to have released it by permitting it to run largely into arrear; nor, without proof, to be suspected of so doing to prejudice those in remainder.

NOTES AND OBSERVATIONS.

(1) SEE *Vane v. Lord Barnard*, 1 *Salk.* 161, 2 *Vern.* 738. *Prec. Ch.* 454. *Bishop of London v. Web*, 1 *P. W.* 527. *Bewick v. Whitfield*, 3 *P. W.* 267, 5th edit. *Chamberlayne v. Dummer*, 1 *Bro.* 166, and 3 *Bro.* 549. *Mary Downshire v. Lady Sandys*, 6 *Ves.* 107. *Williams v. Macnamara*, 8 *Ves.* 70, 71.

The bill submitted, “that if the widow had such an extraordinary privilege as a jointress as to be dispunishable of waste, the same must have been inserted by inadvertency, and without design; and that she ought not to

exercise such power ; or, if given her by design,
 [135] that she ought to exercise it in a reasonable manner ; being a provision made by her husband ; and ought not, by colour thereof, to destroy or prejudice the inheritance, &c. And it stated that she had raised, by sale of the timber and saplings, above 1500*l.* and not left a tree on the premises fit for any repair ; and that she was so unreasonable as to insist upon the plaintiff being at the expense of the repairs, and procuring timber for them, though she knew they had no timber in that neighbourhood, or county, fit for the purpose."

The Court declared, "that from the nature and apparent intention of the settlement of the 2d of September, 1703, the defendant, Lady *Aston*, ought not to be permitted to have any benefit of the trust of the term of 500 years thereby created, for reimbursing to her such money as she had or should expend and disburse in the repairs of the estate thereby limited to her for her jointure, without making satisfaction for the prejudice done by her to the inheritance of the estate, by cutting down such timber, saplings and young trees, as were not proper to be felled according to the usual course of felling timber upon estates in a reasonable and husbandlike manner." And referred it to the Master "to take an account how much the said jointure estate had been damnified by reason of any timber, saplings, or young trees, which had been so felled by the defendant, Lady *A.* or by her order, which ought not to have been felled according to the usual manner of felling timber upon estates in a reasonable and husbandlike manner ; and the Master was to take an account of

[136] all such money as the defendant, Lady *A.* had expended, or disbursed, in repairs upon the said jointure estate, which had not been reimbursed to her out of the rents and profits of the estate comprised in the term of 500 years, and also an account of what was necessary to be laid out to put the said jointure estate in tenantable re-

pair. And it was decreed that so much as the Master should find such damnification of the said jointure estate amounted unto, should be deducted out of what should appear to have been so laid out by the defendant, Lady *A.* in repairs, or should be necessary to be laid out to put the same into tenantable repair; and if there should be any surplus that should appear to be laid out in such repairs, it was declared that the same ought to be raised according to the trusts of the term of 500 years contained in the settlement. And it was further decreed, that the residue of what should appear to be necessary to be laid out in such repairs should be paid by the defendant Lady *A.* for that purpose: but if what the Master should ascertain to be the amount of such damnification should exceed the money that had been laid out, or should be found necessary to be laid out in such repairs, then the Court reserved the consideration of any directions touching the application of such residue till after the Master's report." "And it appearing, by the proofs in this cause, that the trees that are left standing upon the jointure estate are of so small growth and value, as not to be fit to be made use of, even for repairs of the said estate; it is further ordered, that the defendant, Lady *A.* be restrained from felling or [137] cutting down any more timber or trees upon the said estate till the further order of this Court.

Upon the other points, it was referred to the Master to take an account of what was due to the defendant Lady *A.* for the arrears of her annuity, or rent charge of 300*l.* a year, to which she was entitled under the said settlement of 1703; and also an account of what was due to her for the interest of the sum of 3100*l.* charged by the will of Sir *T. A.* upon part of the estate in question, in the county of Norfolk, at the rate of 4 *per cent. per annum.* And the Master was to inquire what arrears of rent were due to Sir *T. A.* the son, at the time of his death, from the tenants of the lands and premises comprised in the term of 500 years,

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created by the settlement, and likewise what arrears of rept were due to Sir T. A. the son, at the time of his death, from the tenants of the Norfolk estate, upon which the said 3100*l.* was charged, and how much thereof was received by the defendant Lady A. or by any other person by her order, or for her use, &c. &c. &c.

HOPKINS *versus* HOPKINS, June 3, 1749.

(*Reg. Lib.* 1748. A. fol. 644.)

VOL. I. page 268.—Vide S. C. Ca. Temp. Talb. 44, and 1 Atk. 581, Mr. Sanders's edit. Contingent remainder upon executory devise.

Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. (1)

NOTES AND OBSERVATIONS.

IT was declared, "that the petitioner *John Hopkins*, was entitled to all such rents and profits of the real estate, and produce of the personal estate, as incurred or [138] became due between the birth and death of *John Osborne* [his grandchild,] and it was ordered accordingly.

(1) See *Bullock v. Stones*, 2 *Ves.* 521. Et vide *Belt v. Mitchelson*, Ch. Dec. 17, 1811, *postea*.

CHAPMAN *versus* HART, June 29, 1749.

(*Reg. Lib.* 1748. A. fol. 695.)

VOL. I. page 271.—Devise of all lands and tenements in or near F. by a will attested by two witnesses only, where the testator had freehold, will not pass leasehold. Contra, if he had only had leasehold.

Bequest of goods on board a ship, is good, though they may have been afterwards removed, and were not on board at the testator's death. The Court will not supply the surrender of a copyhold in favour of a wife or child, under a merely presumed intention to devise it. (1)

Neither choses in action, nor securities for money, pass under a bequest of "goods and chattels."

NOTES AND OBSERVATIONS.

Rose v. Bartlett, is in *Cro. Car.* 292. Et vide *Ithell v. Bean*, 1 *Ves.* 215, et *antea* 114, note. See also *per* Lord Eldon C. 6 *Ves.* 640, &c.

(1) *Church v. Mundy*, (12 *Ves.* 426, and 15 *Ves.* 396) was nearly the case put by Lord *Hardwicke*, towards the top of page 273. Sir *W. Grant*, M. R. had determined accordingly; but Lord *Eldon* C. on the appeal, seemed to be of a different opinion. See 15 *Ves.* 396, 407. The Lord C. held clearly, that a surrender of the copyhold should be supplied if no freehold.

The *Countess of Aylesbury's* case, cited p. 273, is in *Amb.* 68, but more accurately stated 11 *Ves.* 662. Et nota.

On the principal case, the bill was dismissed as to the leasehold lands, and accounts were directed of the testator's personal estate not specifically bequeathed; "and in order to determine, and ascertain what are the specific legacies given by the said testator's will to the plaintiff, it is ordered, that the Master do inquire and take an account of all such goods and chattels as were [139] in the testator's house at Fowey, at the time of his death, and therein specify the particular pieces of plate, if any, that were in the said house. And that the said Master do also inquire and take an account of such goods and chattels of the said testator as at the time of making his will were on board the ship *Warwick*, and before his death were removed out of the said ship *Warwick* on board any other, and what ship; and that the said Master do particularly specify what pieces of plate were on board the said ship *Warwick*, and removed into any other ship as aforesaid." And it was declared, that no securities for money, nor other choses in action, passed by the testator's will by the bequest of goods and chattels in his

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house, or on board the said ship *Warwick*, and that the same could only extend to goods and chattels in possession. And as to such goods and chattels in possession as did pass by that devise, the Court reserved the consideration of any directions relating thereto until after the Master's report. *Reg. Lib.*

POTTER *versus* POTTER, July 6, 1749.

(*Reg. Lib.* 1748. *B. fol.* 385.)

VOL. I. page 274.—Answer of heir believing that a will was made, will not prevent the necessity of its being proved.

NOTES AND OBSERVATIONS.

Ogle v. Cook, cited there, is in 1 *Ves.* 177, *et antea* 103.

[140] LEWIS *versus* HILL, July 6, 1749.

(*Reg. Lib.* 1748. *B. fol.* 556.)

VOL. I page 274.—Covenant in marriage articles to purchase and settle lands. Lands purchased, and suffered to descend, taken in satisfaction of it. (1)

NOTES AND OBSERVATIONS.

(1) THOUGH this immediate case was terminated by consent, it seems clearly to have been so, upon the ground of the law being thus generally settled, and of circumstances rather affording an inference in favour of the application than otherwise. It is observable, that the testator by his will took notice of the covenant, so far as it related to his wife's jointure; and that after reciting that no such settlement had been made, he devised to her an equal annual sum, by way of rent charge. *R. L.*

As to the point of law being thus settled, see *Attorney General v. Whorwood*, 1 *Ves.* 534, 540, &c. *Deacon v. Smith*, 3 *Atk.* 323, and Mr. *Sanders's* notes.

The report is a little inaccurate at the top of page 275, for the bill was not brought by the heir at law, but by persons claiming under a conveyance from those who, at that time, were the covenantor's heirs, and entitled under the covenant. *R. L.*

The administratrix insisted, "that the lands purchased, and suffered to descend, were such as would answer the covenant; and, consequently, in case the plaintiffs could insist on any satisfaction of the covenant, the estates so purchased, &c. ought to be taken as a full satisfaction in case the yearly rents at the time of making such purchase, should appear to have been 600*l.* a year; [141] and if not, then for so much of the 600*l.* a year as the yearly rents amounted unto."

It was ordered, by consent of all parties, (*inter alia*) "that the messuages and farms at and near D. and also near U.; and the messuages and tenements in and near Fetterlane, London, purchased by Sir *R. H.* and permitted to descend to his heir at law, together with 5200*l.* N. S. S. annuities, and 2768*l.* 5*s.* 4*d.* by the decree before directed to be paid by the defendant, should be accepted by the plaintiffs in full satisfaction of the said articles, and of the plaintiff's claims and demands, by or under the same," &c. *Reg. Lib.*

KEMP *versus* WESTBROOK, July 8, 1749.

(*Reg. Lib.* 1748. *A.* fol. 602.)

VOL. I. page 278.—Bill lies by assignees of a bankrupt for account and delivery of goods pledged by the bankrupt, notwithstanding the statute of limitations.

NOTES AND OBSERVATIONS.

THE Master was directed to take an account of what remained due on the 15th of February 1732-3 (the date of the last note exhibited in the cause,) for principal and

interest of the money advanced and lent by the defendant to the bankrupt, on the pledge of the jewels, plate, and effects, mentioned in the original note from the defendant to the bankrupt, dated the 7th of January, 1728-9, and to carry on interest on so much of the principal as remained due. He was also to take an account of the jewels, plate,

and effects specified in the last mentioned note,
[142] and to see which of them remained in specie in the custody or power of the defendant, and what

part thereof had been sold, or otherwise disposed of by the defendant. And as to such part thereof as had been sold or disposed of, it was ordered, that the Master should take an account of the real value thereof, and that the value of such part thereof as had been so sold or disposed of by the defendant, should be applied, in the first place, towards paying the interest, and then towards sinking the principal of what should be so found to have been due to the defendant for the money lent or advanced by him as aforesaid. And if, upon the balance of the said account, any thing should be found to remain due to the defendant for principal or interest, then, on payment thereof by the plaintiff, &c. at such time, &c. the defendant should deliver to the plaintiff such part of the said jewels, plate, and effects, as should be found to remain in specie; but in default, &c. the bill was to stand dismissed, &c. And in case it should appear on the said account, that the defendant was overpaid his said principal and interest, then the defendant was to pay to the plaintiff so much as should remain due to the plaintiff on the said account: and also to deliver to the plaintiff such part of the said jewels, plate, and effects, as should remain in specie, to be applied as part of the personal estate of the bankrupt for the benefit of the creditors seeking relief under the commission. *Reg. Lib.*

UNDERWOOD *versus* HITCHCOX, July 11, 1749.

(No Entry.)

VOL. I. page 279.—Specific performance of agreement refused under the circumstances, the consideration money being inadequate.

BURLEIGH *versus* PEARSON, July 12, 1749.

(No Entry.)

VOL. I. page 281.—Power of appointment by a father not well executed; being contrary to the intention, as collected from a reasonable construction of the recital of the deed, which created the power. “And” construed “or.”

Mansey v. Walker, there cited, is in *Ca. Tem. Talbot*, 72.

JOHNSON *versus* MILLS, July 17, 1749.

(*Reg. Lib.* 1748. *A. fol.* 597.)

— VOL. I. page 282.—Executor bound to set apart a fund to answer future demands under a contract.

NOTES AND OBSERVATIONS.

THIS case was an appeal from the Rolls. His Honour's decree was affirmed.

BARNESLY *versus* POWEL, July 18, 1749.

(*Reg. Lib.* 1748. *A. fol.* 583, 585.)

VOL. I. page 284.—Forged will.
The issues at law.

NOTES AND OBSERVATIONS.

S. C. 1 *Ves.* 119, *et antea*, 74.

Bransby v. Kerrick, cited p. 285, and 287, is in 7 *Bro. P. C.* 437, octavo edition.

[144] The Court declared, “that the merits of the cause upon the original bill do principally depend upon the question touching the validity of the paper writing, dated the 16th day of October, 1736, purporting to be the will of *William Barnesly*, Esq. deceased; and that if the same should be found to have been duly executed by the said *W. B.* deceased, the plaintiff in the original cause cannot be entitled to be relieved against the same; but, if the said paper writing shall be found to have been forged, then the plaintiff in the original cause, as son and heir of the said *W. B.* will be entitled to be relieved in this Court against all the agreements, debts, writings, and assurances, relating to his said father’s estate, obtained from him by any of the defendants in that cause since his said father’s death, and also to be relieved against the said plaintiff’s consent, contained in the order of the Prerogative Court of the 12th day of May, 1742, and the said decree of the Court of Exchequer of the 6th day of December, 1742, in such manner as shall be agreeable to the rules of Equity, unless the paper writings bearing date respectively the 18th and 19th days of June, 1735, exhibited by the defendant *Mansell Powel* in this cause, and produced by him under the order of this Court, dated the 25th day of July last, though not mentioned in his answer, should appear upon all the circumstances of this case to be sufficient both in law and equity to bar the said plaintiff *W. B.* of the relief sought by him by the original bill as to his father’s real estate.

[145] His Lordship doth therefore order, that the parties do proceed to a trial at law at the bar of the Court of King’s Bench by a special jury of the county of

Hereford, at such time as that Court shall appoint, upon the following issues, to wit, first, Whether the said paper writing, dated the 16th day of October, 1736, was duly published by the said *W. B.* deceased, as his last will and testament, and signed by the said *W. B.* and attested and subscribed in his presence by three credible witnesses? And, secondly, Whether the said paper writings, bearing date, respectively, the 18th and 19th days of June, 1735, were sealed and delivered by the said *W. B.* deceased? And the plaintiff in the original cause is to be plaintiff at law, and all the defendants in that cause, except the defendants *Mr. Attorney General, Gale, and Mary Powell,* are to be the defendants, &c. &c. It is further ordered, that none of the agreements, deeds, writings, or assurances, that have been obtained from the said plaintiff *W. B.* by any of the said defendants, or executed by him to any of the said defendants since his father's death, nor his consent contained in the said order of the Prerogative Court, nor the said decree of the Court of Exchequer, be insisted upon, or produced in evidence by the said defendants or any of them. And, if upon the said trial, the jury shall find the said paper writing, dated the 16th day of October, 1736, not to have been duly executed by the said *W. B.* deceased, as his will, then it is further ordered, that an indorsement be made on the *ventre* [146] *facias* or *distringas*, whether such verdiot is grounded on forgery, or upon any particular defect in the execution thereof. And all deeds, papers, and writings, relating to the matters in question in the custody or power of any of the parties, or of *Mr. B.* the said plaintiff's committee, are to be produced before the said Master, upon oath, before the last day of Michaelmas Term next, except such as by the orders of this Court have been left in the hands of the defendant *Mansell Powell's* clerk in Court, or of *Mr. Osen*, the defendant *S. B.'s* solicitor. And, as to these, it is further ordered, that they do remain in

the same custody where they now are, subject to the further order of this Court. And as to all such deeds, papers, and writings, as shall be either produced before the said Master, or shall remain in the hands of the defendant *M. P.*'s clerk in Court, or of the defendant *B.*'s solicitor as aforesaid, any of the parties are to be at liberty to inspect the same," &c. "And the penalty of the recognisance already given by the defendant *Mansell Powel*, to account for the rents and profits of the estate in question as the Court shall direct, appearing to be no more than 3000*l.*, it is further ordered, that the said defendant *M. P.* do give a further security to be approved of by the said Master in the penalty of 2000*l.* with the like condition as is contained in the former recognisance given by him, on or before the last day of Michaelmas term next, or, in default thereof, that the said Master do appoint a proper person to be receiver, &c. [with the usual directions.] And [147] it is further ordered, that an injunction be awarded, to restrain the said defendant *Mansell Powel*, his servants, workmen, and agents, from committing of any waste or spoil upon the estate in question, till the further order of this Court," &c. &c.

The trial at bar appears to have lasted several days. After a full hearing, the jury found in favour of the plaintiff on both of the issues. And they found, and it was marked on the *distringas* as follows: *viz.* "as to the first issue, the jury ground their verdict on forgery, and not on any particular defect in the execution of the will." See *Reg. Lib.* 1748, *A. fol.* 585.

Upon the cause coming on for judgment on the equity reserved (10th July, 1749,) the Court dismissed the cross bill of *Mansell Powel* with costs; and in the original cause decreed, "that all the agreements, deeds, writings, and assurances relating to the estate of *William Barnesly*, the father, which had been obtained from the plaintiff, *W. B.* by any of the defendants in the original cause since his fa-

ther's death; and also the two releases, dated respectively the 25th of January, 1737, and the 10th of February, 1738, should be set aside, and be delivered up, upon oath to the committee of the plaintiff, the lunatic, by such of the defendants, in whose custody or power the same respectively were, to be cancelled; and that such of them as had been brought before and left with the Master, should be delivered out to the plaintiff's committee to be cancelled; and upon all such agreements, deeds, writings, assurances, and releases, which were in the custody or power of the defendant *Mansell Powel*, [148] being delivered up as aforesaid; it was further ordered, that the release from the defendant *M. P.* to the plaintiff, dated the 25th January, 1737, should be delivered up by the plaintiff's committee to the defendant *M. P.* to be cancelled; and that the defendants *M. P.* and *S. B.* should be restrained from making use of, or insisting upon, the decree made in the Court of Exchequer, dated the 6th of December, 1742, and from claiming any benefit thereby: and that the defendant *M. P.* should deliver to the plaintiff's committee the possession of all the real estate in question for the plaintiff's use: and that the Master should inquire whether the defendant *S. B.* was in possession of any part of the real estate, which belonged to *W. B.* the father, at the time of his death; and if the Master should find that he was, then the said *S. B.* should deliver possession of such part, &c. &c.: and that the defendants *M. P.* and *S. B.* should deliver all deeds, court rolls, court books, papers, and writings in the custody or power of them, or either of them, relating to the real estate of *W. B.* the father, upon oath, to the committee of the plaintiff for his use: and that the said *M. P.* and *S. B.* should, at their own expense, by such conveyances and assurances as the Master should approve, convey and assure to the plaintiff and his heirs all the real estate of the said *W. B.* the father; and that all proper parties should join in such con-

veyances and assurances as the Master should direct. The Master was to take an account of the rents and profits of the real estate of *W. B.* the father, accrued since [149] his death, which had been received by the defendants *M. P.* &c. &c.: and in case it should appear that the defendant *S. B.* was, or had been, since the said *W. B.* the father's death, in possession of any part of the real estate: then the Master was to take an account of the rents and profits of such part, &c. &c.; and the defendants *M. P.* and *S. B.* were respectively to pay to the plaintiff's committee what should be found due upon the balance of those accounts for the benefit of the plaintiff, the lunatic; and in taking such accounts, the Master was to make unto all parties all just allowances, and particularly an allowance to the defendants *M. P.* and *S. B.* of all such sums of money as they, or either of them, had paid to the plaintiff, or by the order, or for the use of, the plaintiff, or for the maintenance of the plaintiff, or of his wife. The Master was to appoint a receiver, &c. &c. And as to the relief sought by the original bill, touching the personal estate of the said *W. B.* it appearing that the probate of the said will in the Prerogative Court was obtained by fraud and imposition upon the plaintiff, in consequence of the deed of the 10th of May, 1742, and the deed or writing of proxy executed by the plaintiff, under his hand and seal, mentioned in the order of the Prerogative Court, dated the 12th of May, 1742; it was further ordered and decreed, that the said Master, before whom the probate or letters testamentary granted to the defendant *S. B.* had been brought, should cause the same to be transmitted to, and lodged with, the Registrar of the Court of Delegates, before whom an appeal was brought from the said [150] probates by the committee of the plaintiff, the lunatic, on his behalf; and that the defendant *Mansell Powel* should, within a fortnight after the beginning of the then next term, bring in and deposit with the

said Registrar, the probate of the said will or letters testamentary granted to him ; and that the defendants *B.* and *Powel* should, within a week after such probates or letters testamentary should be so brought in and lodged with the said Registrar, appear in the said Court, either by themselves or their proctor or proctors respectively, and consent to a reversal of the sentence, for granting the said probates, or either of them, and to the revocation of both the said probates or letters testamentary, to the intent to enable the said Court of Delegates by such consent as aforesaid, to cause the said probates or letters testamentary to be duly revoked according to the course of that Court ; and that the defendant *Powel* should be at liberty, within three weeks after the said probates or letters testamentary should be revoked, to exhibit and propound in the Prerogative Court the paper writing, dated the 9th of September, 1735, insisted upon by the defendant *Mansell Powel*, in his answer, to be a will of the said *W. B.* deceased, and to proceed with effect, according to the course of the said Court, to obtain probate thereof, as he should be advised ; but in case the said defendant *P.* should not, within three weeks after the revocation of the said probates or letters testamentary, exhibit and propound the said paper writing, dated the 9th of September, 1735, as aforesaid ; or in case the defendant *P.* should exhibit and propound the said paper writing of the 9th of September, 1735, within the time aforesaid ; and the same [151] should be finally determined in the Ecclesiastical Court not to be the will of the said *W. B.* deceased ; then it was further ordered and decreed, that the defendants *M. P.* and *S. B.* should, within a week after either of those cases should happen, by themselves or their proctor or proctors respectively, consent, in the said Prerogative Court, that letters of administration may be granted of the personal estate of the said *W. B.* deceased, to the plaintiff's committee, on the behalf, and for the use and

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benefit of the plaintiff. And in case the said defendant, *M. P.* should exhibit and profound the said paper writing of the 9th of *September*, 1735, in the Prerogative Court, and not proceed thereupon with effect, then the plaintiff was to be at liberty to apply to the Court [of Chancery] for further directions touching the same, to the end that the personal estate of the said *W. B.* deceased, might be secured and forthcoming, for the benefit of such of the parties as should appear to be entitled thereto: and it was further ordered and decreed, that *Mansell Powel* and *S. B.* should forthwith bring before the Master, upon oath, all mortgages, bonds, notes, and other securities for money, in their, or either of their custody or power, which were part of, or belonging to, the personal estate of the said *W. B.* deceased; and that the said defendants should come to an account for the said *W. B.* deceased's personal estate received by them, &c. &c.; the balance of which they were to pay into Court, without prejudice to any claims or demands, or to any other allowances,
 [152] which any person whatsoever might thereafter appear to have, or be entitled to, out of such personal estate, &c. &c.

And it was ordered, that the defendants, *Mansell Powel* and *S. B.* should pay to the committee of the plaintiff his costs of the suit to that time, and also his costs at law, to be taxed by the Master: and as between them the Court reserved the consideration of subsequent costs, until after the Master's report. See *Reg. Lib.* 1748, *A. fol.* 583, 585.

LOMAX *versus* HOLMDEN, *July 22, 1749.*

(*Reg. Lib.* 1748. *B. fol.* 455.)

VOL. I. page 290.—Second born son may take under a limitation "to the first son," he being so at the time.(1)

NOTES AND OBSERVATIONS.

(1) SEE *Emery v. England*, 3 *Ves.* 232.

SEWELL *versus* BRIDGE, July 24, 1749.

(*Reg. Lib.* 1748. *B.* fol. 396.)

VOL. I. page 297.—Plea of a general agreement and composition of accounts (1) good, without its being a minute strict settlement of items.

NOTES AND OBSERVATIONS.

(1) SEE *Townsend v. Lowfield*, 1 *Ves.* 37, *et antea* 31; *et vide* 2 *Ves.* 482, 565.

HEARLE *versus* GREENBANK, Aug. 3, 1749.

(*Reg. Lib.* 1748. *A.* fol. 698.)

VOL. I. page 298.—S. C. 3 *Atk.* 695. Quod vide.

NOTES AND OBSERVATIONS.

SEE the decree accurately stated in 3 *Atkyns*.

Caster v. English, cit. p. 301, is in 1 *Atk.* 603.

Sir Edward Clere's case, cit. page 302, is in 4 *Vin. Ab.* 168, p. 66 S. C. 6 *Bro. P. C.* 152, [153] octavo edit.

Noys v. Mordaunt, p. 303, is in 2 *Vern.* 581.

As to the power of feme covert to recover her separate estate, vide *Allen v. Papworth*, 1 *Ves.* 101, *et antea*, 88. *Grigby v. Cox*, 1 *Ves.* 517, 518, *et* 2 *Ves.* 75, 190, *et postea*; and *Hyde v. Price*, 3 *Ves.* 101.

The case mentioned by Lord Hardwicke, p. 305, is Lady Travel's case. See the rep. of the principal case in 3 *Atk.*

BECKFORD *versus* TOBIN, Nov. 4, 1749.

(*Reg. Lib.* 1749. *A. fol.* 53.)

VOL. I. page 308.—Construction of will. Interest of legacy from death of testator, on the manifest intent as to maintenance.(1)

NOTES AND OBSERVATIONS.

(1) VIDE *Crickett v. Dolby*, 3 *Ves.* 10. *Mitchell v. Bowes*, *ibid.* 282. *Sitwell v. Bernard*, 6 *Ves.* 520. *Gibson v. Bott*, 7 *Ves.* 80, 94, 97, &c. See also *Schoales & Lefroy's* reports.

LACAM *versus* MERTINS, Nov. 8, 1749.

(*Reg. Lib.* 1749. *B. fol.* 93 and 147.)

VOL. I. page 312.—See S. C. at the original hearing. 3 *Atk.* 1. S. C. 1 *Will.* 3.

[154] BEARD *versus* TRAVERS,
November 9 and 13, 1749.

(*Reg. Lib.* 1749. *A. fol.* 26.)

VOL. I. page 313.—Attempt to marry child of Court clandestinely.

NOTES AND OBSERVATIONS.

THE order in question is, "that the infant should not be married without the leave of the Court, nor suffered to go out of *England*; that neither Lord *Montague*, nor Lady *M.* nor *M. Brown*, the son of Lord *M.* should have any access to the infant, nor write any letter or letters to her; and that the infant should not be permitted to have access to Lord *M.* nor Lady *M.* nor Mr. *B.* or any of them; nor to write any letter or letters to them, or any of them, during such time as she should remain in the custody and under the care of Lady *Primrose*."

JOHNSON *versus* SMITH, Nov. 10, 1749.

(Reg. Lib. 1749. A. fol. 126.)

VOL. I. page 314—Election.—Deed-poll not delivered, (1) but operating at the death of grantor, and a bond given in favour of a natural daughter. She was put to her election. Gift over on A's refusal to marry B. The forfeiture held not to take place from an offer being declined once or twice, but from a more formal acknowledgment.

NOTES AND OBSERVATIONS.

(1) SEE *Peck v. Parrott*, 1 Ves. 236, 237, *et antea*, 428.

Oliver v. Brickland, cit. p. 315, is in 3 Atk. 420. *Shudal v. Jekyll*, cit. *ibid.* in 2 Atk. 516.

The bill stated, that *William Johnson* several times requested the devisee to intermarry with him, and particularly on the 5th of March and 21st of [155] May, and on the 14th, 20th, and 21st of June, 1743, (the testator having died in the month of January,) but that she had refused, &c.: and after the expiration of six months from the testator's death had acknowledged the same, and yielded up possession of the real estate. "And a question being made in the cause, whether the defendants, Sir *Edward Smyth* and his wife, are entitled to the rents and profits of the real estate, accrued after the testator's death, until the end of six months after such death, his Lordship declared, that the defendants, Sir *Edward Smyth* and his wife, are entitled thereto," &c. *Reg. Lib. ubi supra*, fol. 128.

The defendants insisted they were entitled to all such "sums of money as were out at interest, and due or owing to J. J. upon the day of the date of the instrument, as specifically given and assigned to them, against every one but Mr. *Johnson's* creditors; and that by virtue of the bond they were well entitled to 10,000*l.* and interest for the

same, to be paid in the first place by and out of such personal estate as the said *J. J.* was possessed of at the time of his death; and in case such personal estate should prove deficient, then out of his real estate, which the defendants believed was *Joseph Johnson's* real intention." *R. L.*

After declaring the will well proved, &c. it was declared, that the defendants, Sir *Edward Smyth* and Dame *Elizabeth* his wife, in right of the said *Elizabeth*, were not entitled both to the benefit of the deed and of the bond,

but were entitled to elect either of them, as they [156] should think most for their benefit; "and it

being admitted on the part of Sir *E. S.* and his wife, that it will be most for their advantage to take the benefit of the said bond, it is ordered and decreed, that it be referred, &c. to compute interest on the said sum of 10,000*l.* at the rate of 2*l.* per cent. per annum, from the date of the said bond to the end of three months after the death of the said testator *J. J.*; and from that time at the rate of 5*l.* per cent. per annum." The Master was also to take an account of all other the testator's debts; and of his funeral expenses; and likewise an account of his personal estate received by the defendants, Sir *E. S.* and his wife, &c. &c. In case the personal estate should not be sufficient to pay the defendants what should be found due for principal and interest on the said bond, in the course of administration, a sufficient part of the real estate was to be sold, and the money arising thereby applied in payment of so much of what should be found due to the defendants, and the other specialty creditors of the testator, as his personal estate would not extend to satisfy. Directions were then given for marshalling the assets, and taking the accounts of the rents and profits of the real estate, agreeably to the declaration of the Court above mentioned, &c. &c. &c.; and the defendants, Sir *E. Smyth* and his wife, were ordered to be paid their costs up to the hearing; subsequent costs being reserved. *Reg. Lib.*

DUROUR *versus* MOTTEUX, Nov. 21, 1749.

(Reg. Lib. 1749. A. fol. 253.)

VOL. I. page 320.—Mortmain. Conversion of realty into personalty. (1) Residuary bequest. Real estate directed to be sold, and together with personal, applied (*inter alia*) to charitable purposes, and “that the trustees should place out all the residue of testator’s estate, and the interest thereon, on securities, and divide it, &c.” Held, first, that the bequest as to the charity, was void; and next, that the whole, as to other matters, was turned into personalty. Residuary bequest of personalty includes every thing; as a void legacy, or one that has lapsed. (2)

NOTES AND OBSERVATIONS.

(1) SEE *Fletcher v. Ashburnham*, 1 Bro. 497; and *Ackroyd v. Smithson*, 1 Bro. 503. *Brown v. Bigg*, 7 Ves. 279. *Sheddon v. Goodrich*, 8 Ves. 481.

(2) “In case of lapse of real estate, the heir takes; but in the case of personal property, the residuary legatee is preferred either to the next of kin or the executor.” Per Lord Eldon, C. 8 Ves. 25; in *Cambridge v. Rous*. Vide 1 Ves. 141, and 2 Roper on Leg. 487, &c.

The residuary legatee must, however, be a general, and not a partial one; for if the will gives a legatee what remains after payment of legacies, he will not be entitled to any benefit from lapses. See the cases, 2 Roper on Leg. 490, &c.

KNIGHT *versus* DUPLESSIS, Nov. 23, 1749.

VOL. I. page 324.—The Court will not appoint a receiver on bill by her against a devisee to controvert the will, unless there are strong circumstances.

NOTES AND OBSERVATIONS.

Andrews v. Powys, cit. p. 325, is in 2 Bro. P. C. 504, octavo edit.

same, to be paid in the first place by and out of such personal estate as the said *J. J.* was possessed of at the time of his death; and in case such personal estate should prove deficient, then out of his real estate, which the defendants believed was *Joseph Johnson's* real intention." 1

After declaring the will well proved, &c. it was declared, that the defendants, *Sir Edward Smyth* and *Elizabeth* his wife, in right of the said *Elizabeth* not entitled both to the benefit of the deed and of the

but were entitled to elect either of them
[156] should think most for their benefit;
being admitted on the part of *Sir E.*

wife, that it will be most for their advantage. The benefit of the said bond, it is ordered and decreed to be referred, &c. to compute interest on the 10,000*l.* at the rate of 2*l.* per cent. per annum from the date of the said bond to the end of three months after the death of the said testator *J. J.*; and from thence to the rate of 5*l.* per cent. per annum." The Court then ordered to take an account of all other the testator's debts, his funeral expenses; and likewise an account of the personal estate received by the defendants, *Sir E.* and his wife, &c. &c. In case the personal estate should be sufficient to pay the defendants what should be due for principal and interest on the said bond, and the costs of administration, a sufficient part of the said personal estate be sold, and the money arising thereby applied to the payment of so much of what should be found due to the said defendants and the other specialty creditors of the said testator as the personal estate would not extend to; and the residue were then given for marshalling the said accounts of the rents and profits of the said real estate, in conformity to the declaration of the Court. And the defendants, *Sir E.* and his wife were ordered to be paid their costs, and the costs of the subsequent costs being reserved.

**BILLON versus HYDE, November 25,
and December 11, 1749.**

(Reg. Lib. 1749. A. fol. 227, entered "*Billon v. Hanbury.*")

VOL. I. page 326.—Relief in account, as to payments made to a bankrupt after a secret act of bankruptcy, (1) when the assignees had recovered by action payments made by the bankrupt.

NOTES AND OBSERVATIONS.

(1) By a late Act of Parliament, 46 Geo. III. c. 135, all conveyances, payments, contracts, dealings, and transactions, by and with any bankrupt *bona fide* made or entered into more than two calendar months before the date of the commission, are declared good and effectual, notwithstanding the prior act of bankruptcy, provided the parties have not, at the time of such conveyance, &c. any notice of a prior act of bankruptcy committed by such bankrupt; or that he was insolvent, or had stopped payment. Vide that statute for other particulars.

The bill alleged, that the plaintiff in Equity had, at the trial, insisted on his present claims; viz. that if he was to be charged with the monies he had received, it was but just and reasonable that the monies he had actually paid should be set off against the former, and that a verdict should only be given for the remainder; and that the plaintiff had proved the payment of several of the sums, and was prepared to prove the residue; but it being alleged that it was unnecessary for him to do so at that time, since the commissioners would settle the account, he, the plaintiff, did not proceed any further in the proof, not doubting but that he should have such allowance before the commissioners. The bill then set [160] forth particularly the several sums advanced, and stated, that upon the plaintiff's making application to the commissioners, they refused or declined to set off the

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amount of such payments. It therefore prayed to have an allowance of them.

It was by consent agreed, that the assignee should deduct and allow to the plaintiff the said sum of 712*l.* 2*s.* out of the money recovered by the assignees at law against the plaintiff in Equity. No costs were to be paid on either side. *R. L.*

Though the actual termination was on consent, it seems to have been founded on the opinion of the Court.

ROW *versus* DAWSON, Nov. 27, 1749.

(*Reg. Lib.* 1749. *B. fol.* 89.)

VOL. I. page 331.

NOTES AND OBSERVATIONS.

THE costs of all parties were directed to be paid out of the remainder of the Exchequer monies, after deducting the monies to be paid by *Tonson* and the executors of *Cowdery*.

THOMAS *versus* KETTERICKE, Dec. 5, 1749.

(*Reg. Lib.* 1749. *B. fol.* 113.)

VOL. I. page 333.

[161] PYOT *versus* PYOT, Dec. 6, 1749.

(*Reg. Lib.* 1749. *B. fol.* 112.)

VOL. I. page 335.—Devise of real and personal estate in trust for the nearest relation “of the *Pyots*.”(1) The latter held to be “*nomen collectivum*,” and descriptive of that particular stock; and that this mixed fund(2) should not go to the heir at law of that name. A change of the name of *Pyot*, by marriage, held not to exclude.

NOTES AND OBSERVATIONS.

(1) IT seems that the words were not as in the report "of the name" of the *Pyots*, but merely "of the *Pyots*." See *Reg. Lib.* and what is relied on by Lord *Hardwicke* at page 338. See also 15 *Ves.* 99.

Vide the important case of *Leigh v. Leigh*, 15 *Ves.* 92.

(2) See *Roach v. Hammond*, *Prec. Ch.* 401. As to real estate alone, see *Rayner v. Mowbray*, 3 *Bro.* 234. As to the cases in general, vide *Goodinge v. Goodinge*, 1 *Ves.* 231, 232, *et antea*.

In cases of the kind relative to personalty, it appears clearly, that although the statute of distribution be the rule and measure of the distribution where the will is silent, the will nevertheless will be the guide as far as possible; "for the statute is substituted only where the intention cannot be made out." *Greenwood v. Greenwood*, 1 *Bro.* 30, 32, note.

The case mentioned at the end of the Rep. page 338, as in the House of Lords, is *Barber v. Bateman*, 3 *P. W.* 65, and 4 *Bro. P. C.* 194, octavo edit.

The point there decided was also so held in *Leigh v. Leigh*, 15 *Ves.* 92.

GAMMON *versus* STONE, Dec. 7, 1749. [162]

(*Reg. Lib.* 1749. *A. fol.* 132.)

VOL. I. page 339.—Bill of surety in a bond to have it assigned after having paid its amount, dismissed with costs, as useless. (1) Right to principal and interest generally carries costs. Tender must be very express and formal to prevent costs.

NOTES AND OBSERVATIONS.

(1) **BILLS**, however, are very frequently filed in the Court of Exchequer to have void Policies of Insurance delivered up; and they are sometimes followed up by decrees, upon the principle of preventing vexatious demands. See

7 *Ves.* 20, 21, 249. Vide *Woffington v. Sparks*, 2 *Ves.* 569.

It appears that the plaintiff had actually paid the money. The decree is as follows: "The matters in difference between the said parties, for and touching which the plaintiff, by her bill, seeks to be relieved, coming on this day to be heard, &c.: and it being admitted that the defendants have been paid the principal and interest due on the bond in question, and their costs at law, by the plaintiff, and the plaintiff now waving the praying any assignment of the said bond from the said defendants, his Lordship saw no cause to give the plaintiff any relief in equity, and therefore dismissed the bill with costs." *R. L.*

[163] WALMSLEY *versus* CHILD, Dec. 11, 1749.

VOL. I. page 341. —No relief in equity on lost instrument, where no affidavit of the loss, and no offer of indemnity. (1) As to action on note payable to A. or bearer. (2) And as to action on lost bond. (3)

Modern practice of Courts of Law in dispensing with profert. This by no means destroys or affects the ancient and acknowledged jurisdiction of Courts of Equity.

NOTES AND OBSERVATIONS.

Glyn v. B. of England, cited p. 342, 343, appears in 2 *Ves.* 38.

(1) Vide *ex parte Greenway*, 6 *Ves.* 812, 813; and see *E. I. Company v. Boddam*, 9 *Ves.* 464.

(2) Although the doctrine stated by Lord *Hardwicke*, towards the bottom of page 343, once prevailed; namely, that the mere bearer of a note "payable to A. or bearer" could not formerly maintain an action on it (yet see *Hinton's case*, 2 *Shower*, 235,) it is now entirely settled otherwise. Vide *Grant v. Vaughan*, 3 *Burr.* 1516, &c.; and 1 *Black. Rep.* 485. See also the last edition of Mr. *Chitty's* work on bills of exchange, 90.

(3) In an action upon a bond, a profert was absolutely

requisite in the greater part of Lord *Hardwicke's* time, as stated in page 345 (yet see 1 *Ves.* 388, 393.)

Lord *Eldon* C. (referring, it seems, to this and a subsequent case, 1 *Ves.* 392, 393) says, "I have found in Lord *Hardwicke's* own hand his most positive declarations, that upon such an instrument it is impossible to maintain an action without profert. The law, however, is now settled otherwise. *Read v. Brookman*, 3 *T. R.* 151." Vide *ex parte Greenway*, 6 *Ves.* 812, 813.

The wisdom of the old law, in keeping the two jurisdictions separate, and the mischief of innovation in the above point, is most fully illustrated in *ex* [164] *parte Greenway*, *ubi supra*; in 7 *Ves.* 20, &c. and in 9 *Ves.* 466, &c.

Though the Judges have thus extended their jurisdiction, they do not give the party against whom the action is brought the same benefit as he would have in a Court of Equity, since the plaintiff there is obliged to make an affidavit of the loss, and that the instrument is not in his possession or power; and inasmuch also, as the Courts of Law are unable to secure a proper indemnity. Vide *ubi supra*, and especially 9 *Ves.* 466, 467, *qua nota* Lord C.'s observations on the act 9 and 10 *Will.* III. c. 17. § 3.

Notwithstanding this assumption of jurisdiction by the Courts of Law, it is perfectly clear, that it neither has, nor can destroy the ancient jurisdiction of the Courts of Equity. Vide *ubi supra*, *passim*.

SCHELLINGER versus BLACKERBY, Dec. 16, 1749.

(*Reg. Lib.* 1749. *B. fol.* 114.)

VOL. I. page 347.—The grant of a menial office in the House of Lords for a term of years, liable to creditors; and a daily fee, or allowance, held to be subject also.

RYALL versus ROWLES, Jan. 27, 1749-50.

VOL. I. page 348.—S. C. 1 Atk. 165, *quod vide* with Mr. Sanders's notes.

Pawnees of goods, &c. permitting bankrupt to continue in possession, or in the order and disposition of them, have no specific lien on them against the assignees. (1)

Assignments of debts. (2)

Equities as between partners.

Neglect of first mortgagees, as to title deeds, &c. (3)

NOTES AND OBSERVATIONS.

(1) SEE 1 *Bos. & Pul.* 86.—Though “debts” in general are within the stat. 21 *Jac.* I. c. 19, § 10, 11, yet mortgages of *real* estate (whether original or by assignment) are not: and their being also secured by bond or covenant makes no difference. Vide *Jones v. Gibbons*, 9 *Ves.* 407.

Ex parte Marsh, cited p. 352 and 365, is in 1 *Atk.* 158, 159. *Stephens v. Sole*, cited *ibid.* and p. 361, appears also 1 *Atk.* 157, 161, 170.

Borne v. Dodson, cited p. 353, is in 1 *Atk.* 154. Vide 2 *Ves.* 272, &c.

Brown v. Heathcote, cited p. 361, is in 1 *Atk.* 160.

(2) See p. 353.—In order to make an effectual assignment of debts, to completely divest the party, he must have every thing equivalent to a delivery of chattels personal, as far as the case admits of: such as an assignment and delivery of the securities, where any; and [as it seems] have given notice of the assignment to the debtor. Without this latter, the party indebted might safely pay the original creditor. Vide 9 *Ves.* 410.

As to the lien, &c. as between partners, mentioned p. 353, vide *West v. Shipp*, 1 *Ves.* 239, 242, *et antea* 130. Et vide 9 *Ves.* 410. *Ex parte Ruffin*, 6 *Ves.* 119, &c. 11 *Ves.* 4, 5. *Ex parte Fell*, 10 *Ves.* 347. *Ex parte Williams*, 11 *Ves.* 3.

(3) There must be some mistake in the reporter, p. 360. It is not a general rule that a first mortgagee shall be postponed by mere negligence in omitting to obtain the title deeds. To effect that, the case must amount to fraud. See *per* Lord Eldon, C. in *Evans v. Bicknell*, 6 Ves. 183.

PYKE *versus* PYKE, Jan. 31, 1749-50.

(*Reg. Lib.* 1749. B. fol. 177.)

VOL. I. page 376.—Covenant by husband before marriage to settle lands in jointure for wife, and other part for the issue of the marriage, her fortune to remain in trustees till such settlement made. The husband dying insolvent, without performing it, the wife's fortune survives for her own benefit, and the issue not entitled to take it from her.

NOTES AND OBSERVATIONS.

THE covenant was to settle "lands in Ireland, of the clear yearly value of 400*l.* sterling, as money was valued in that kingdom, in such manner, that immediately from and after the decease of her said husband, the plaintiff should enjoy the same for her life, as her jointure."

It is stated in *Reg. Lib.* as from the bill, that the husband had an estate in Ireland, but that it was so loaded with incumbrances, that the plaintiff's fortune was not nearly sufficient to pay off such as were prior to the articles: for which reasons the executors of the plaintiff's father did not think it advisable to apply the plaintiff's fortune in discharge of them.

Perkins v. Lady Thornton, cited p. 377, is in *Amb.* 502.

CRAY versus MANFIELD, Feb. 7, 1749-50.

(Reg. Lib. 1749. A. fol. 658.)

VOL. I. page 379.—Voluntary conveyance, by one lately come of age, (1) to an agent, of a reversion of no great value, for a nominal consideration of 180*l.* (2) and containing covenants as in the case of a purchase, not absolutely rescinded, (3) as not being a case of fraud ; but the transaction modified by decree, that the agent should release the covenants at his own expense, and recite the impropriety of them as referable to a gift.

Sir J. STRANGE, M. R.

NOTES AND OBSERVATIONS.

(1) SEE *Hylton v. Hylton*, 2 *Ves.* 547, *et postea*, 3 *Wood. Appendix* 16, and 9 *Ves.* 292.

(2) The Report p. 379, should have stated the deed as “for a nominal consideration,” &c.

(3) Vide *Oldham v. Hand*, 2 *Ves.* 259, *et postea*. The author of these notes ventures, with all due deference, to doubt the propriety of the decision in the principal case : and he conceives, from the solemn and just consideration which has been applied to such instances in late cases, that a conveyance under the circumstances stated, would now be set aside in toto.

As to *Pierce v. Waring*, cited p. 380, see also 2 *Ves.* 548. *Walmsley v. Booth*, cited *ibid.* is in 2 *Atk.* 25, 27, and *Barn. Ch. Rep.* 475.

In the principal case, the defendant (*inter alia*) stated his hope “that the said conveyance being not obtained by fraud, deceit, or circumvention, but being the effect of a constant determined resolution, for three years and upwards, and being intended partly as a reasonable compensation for the defendant’s expenses, on occasion of the defendant’s entertaining him, his friends, and attendants, and partly as a bounty and kindness ; and being executed with due consideration and deliberation, and without any sort

of undue influence, he should therefore enjoy the benefit thereof, and that the said conveyance [168] should not be set aside, or delivered up."

The Court dismissed the bill so far as it sought to set aside the deed, or to have the same delivered up, to be cancelled; and decreed, that the defendant should, at his own expense, "execute to the plaintiff a special release of all the covenants contained in the said deed, reciting the said deed, and that the said covenants are improper covenants to be contained in a voluntary deed, and that the defendant admits the said deed to be a voluntary deed, and that he paid no consideration for it." The Master was to settle such release in case the parties differed about it, and no costs were to be paid on either side. *Reg. Lib.*

TRAVERS *versus* BULKELY, Feb. 8, 1749-50.

(*Reg. Lib.* 1749. B. fol. 175.)

VOL. I. page 383.—S. C. 1 Dick. 138. Husband being abroad, a wife having appeared, and obtained an order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside.

NOTES AND OBSERVATIONS.

Burton v. Malone, cited p. 385, is in *Barn. Ch. Rep.* 401.

As to *Dubois v. Hole*, 2 *Vern.* 613, mentioned p. 386, see Mr. *Raithby's* note.

WHITFIELD *versus* FAWCET, [169]
February 10, 1749-50.

(*Reg. Lib.* 1749. B. fol. 541.)

VOL. I. page 387.—Purchaser of an equitable title to a rent-charge, claiming against some purchasers of the land for a valuable consideration without notice, must try his title at law, in the name of his vendors.(1) What amounts to notice.

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Draft of a deed, traced into possession of defendant's family, very good evidence. (2)

Where a party may come into Equity on the loss of a deed.

New practice at law of dispensing with profert. (3)

Bill retained for twelve months, with liberty to bring an action, &c. but afterwards dismissed voluntarily without a trial.

As to dispensing with profert of a bond at law.

Evidence as to loss of a deed. (3)

As to a fine of land not barring a rent-charge of a third person, issuing thereout. (4)

NOTES AND OBSERVATIONS.

(1) As between the plaintiff and the defendants, the *Fawcets*, the bill was retained for twelve months, with liberty for the plaintiff to distrain for the arrears, &c. or to take such other remedy at law for the same, in the name of the defendants, the *C's*, as he should be advised; and that he should indemnify those defendants, &c. And in case it should happen that any such further assurance as was before mentioned in that decretal order, should be executed by the defendants, the *C's*, to the plaintiff, before any distress should be made, or action at law brought concerning the said arrears; then the defendants, the *F's*, were not to set up the same, or take advantage thereof in any action of replevin, or any other action to be brought for such arrears, &c. &c. &c.

It appears from the Registrar's Book of the next year (January 19th) that the defendant *B. F.* had died since the decretal order, and that, before his death, a distress was made on the premises; that the distress was replevied, and that the plaintiff in replevin had declared thereupon; so that the cause was likely to come to trial at the next assizes. *Reg. Lib.* 1750, *B. fol.* 159.

It appears, however, from a subsequent part of the same book, that on the 11th of the following [170] July, the plaintiff obtained an order to dismiss his bill without costs upon the defendant's consent, he having been since advised to proceed no further therein. *Fol.* 532.

(3) Vide *Walmsley v. Child*, 1 *Ves.* 345, et antea 163, and 1 *Ves.* 505.

(4) The position of Lord *Hardwicke*, towards the top of page 391, is controverted by Lord *Mansfield*, C. J. His Lordship says, that the doctrine thus broadly laid down, viz. that "a rent-charge is gone by a fine of the land," is totally mistaken, and by no means warranted by the case in *Carter*: and that the rule is universal, that a rent-charge, in a third person, is not barred by a fine and non-claim.

Vide *Goodright dem. Hare v. Board and Jones*. 1 *Cruise on Fines*, 249, 251, 252. Vide *ibid.* 248.

VANESSEN *versus* EAST INDIA COMPANY,
February 24, 1749-50.

(*Reg. Lib.* 1749. *B. fol.* 287, entered "*Van Essen v. Count of Slippenbach.*")

VOL. I. page 395.—S. C. 1 *Dick.* 140, *quod vide*. The whole line of process having been gone through against the plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at law, and there may be a decree for transfer of her separate property against the other defendants, who did appear.

NOTES AND OBSERVATIONS.

(1) THE case being rather singular, the author of these notes has thought it right to state it somewhat particularly; though the substance of it appears in 1 *Dickins*, 140.

The bill was filed by *Susannah Eliz. Van Essen*, by her next friend, against her husband the Count of *Slippenbach*, and the South Sea Com- [171] pany, praying that the husband might set forth whether he had any objection, and what, against the plaintiff receiving the dividends and interest due, and to grow due, on the S. S. stock mentioned in the bill, and transferring the said stock to whom the plaintiff should think proper; and that the defendants, the South Sea Company, might be decreed to pay to the plaintiff, or to whom she

should appoint, all interest and dividends due, or thereafter to grow due on the said stock, and to permit her, or whom she should appoint, to transfer the said stock to such person or persons as she should think fit, without the concurrence of her husband.

For this end the bill stated, that in January, 1742, the plaintiff being a widow, and possessed of considerable personal estate, and among other things, of 3,500*l.* old South Sea annuities; she and her husband, before their intermarriage on the first of February, 1742, appeared before the persons, and in the presence of certain persons at the Hague, and mutually signed an instrument, according to the laws of Holland, by which they declared their intention to engage in marriage, and that they had beforehand bargained and agreed, that in case the marriage should take effect, there should not be any of the least community of goods, effects, or estate between them, but that the plaintiff should have the same free and absolute power, government, administration, management, and disposition, as well of all her goods, effects, and estate, then in her possession, as she had had during her widowhood,

[172] without being controlled by her said husband, and that he should not assume any authority over the said estate; and that he, by the said instrument, disclaimed and renounced all power over her said estate which he could or might have in right of his marriage. The bill then, after alleging that the marriage took place soon afterwards, and the plaintiff's husband having spent a considerable part of her estate, and her refusing to let him have any more of it, proceeded to state that a misunderstanding arose between them; whereupon they, in July 1743, agreed to be separated from table, bed, and cohabitation; which agreement was ratified and confirmed by the sentence and decree of the Court of Holland. That the plaintiff having found some difficulty in receiving and getting into her possession some of her effects which were

out of Holland, by her husband's refusing to intermeddle in her affairs, he declaring they did not concern him, she, the plaintiff, by her petition to the said Court of Holland, reciting the agreement between her and her husband before their marriage, and also their marriage, and separation, prayed that the Court would qualify and empower her solely, without her husband, to receive, possess, and administer, all her goods and effects, whatsoever, and wheresoever, and to dispose thereof, and manage all her affairs herself, as well in law as otherwise; whereupon the said Court having examined the contents of such petition, and heard the report of the commissioners, before whom she and her husband appeared, and having taken notice of the said declaration of her husband, decreed according to the terms of the petition. That a [173] considerable sum being due to her for the interest and dividends on the said 3500*l.* S. S. stock, she had applied to the defendant, the S. S. Company, to pay the same to her, and permit her to transfer the stock as she should think fit; but that they refused so to do, without a proper direction or power from her husband; whereupon she applied to and requested her husband to join with her in executing a proper instrument to empower some person to receive the dividends, &c. &c. for her use, and to join in a transfer; but that her husband refused, alleging, that he had nothing to do with her estate or effects, and therefore did not chose to concern himself therewith; so that she was kept out of her dividends, and also hindered from disposing of the stock.

The defendants, the Governor and Company of the South Sea, admitted the stock to be in their books, and that the application alleged had been made relative to it; but stated, that the party who so applied, was told, that there being no trustee in whom the stock was vested for the plaintiff's separate use, the Company could not, according to the laws of England, with safety, permit a

transfer of the same, or pay the dividends thereon without the consent of the plaintiff's husband, unless they were indemnified by the direction of some proper Court of this kingdom. And they professed their readiness to act as the Court should direct.

The decree is entered in the following terms, "And whereas the said defendant, *Casimir Count of* [174] *Slippenbach*, whose constant residence is beyond sea, hath been duly served with process to appear to, and answer the plaintiff's bill, and refusing so to do, all process of contempt, to a sequestration, have regularly issued against him for want thereof; and he persisting in his said contempt, a commission of sequestration, under the seal of this Court, was thereupon regularly awarded against him; notwithstanding which he still persists in his said contempt, and refuses to appear to and answer the plaintiff's bill, and the said commission of sequestration issued against the said Count *S.*: An affidavit of the service of the said subpœna for the said Count to appear to and answer the plaintiff's said bill; A translation of an exhibit marked T. No. 2, purporting to be a true translation of the said ante-nuptial contract between the said defendant and the plaintiff, dated, &c.; A translation of an exhibit, marked T. No. 3, purporting to be a true copy of the said sentence of the Court of Holland, for confirming the said agreement of separation, &c.; A translation of an exhibit, marked T. No. 4, purporting to be a true translation of the plaintiff's said petition to the Court of Holland, and the order of the said Court, dated, &c. being now produced and read," &c. &c. His Lordship, as between the plaintiff and the defendants, the S. S. Company, doth declare, that the said O. S. S. annuities in question in this cause, ought to be considered as part of the personal estate of the plaintiff, settled by her said marriage agreement, dated at the Hague, the 28th day of

December, 1742, to her separate use, free from the intermeddling of the defendant the Count de [175] S. her husband, and doth order and decree, that the said defendants, the S. S. Company, do pay to the plaintiff, or such person or persons as she shall appoint, the dividends that have accrued, or shall accrue, due on the said O. S. S. annuities; and permit the said O. S. S. annuities to be transferred by her, or such person as she shall authorise for that purpose, at her will and pleasure," &c. *Reg. Lib.*

ASTON *versus* ASTON, Feb. 26, 1749-50.

(*Reg. Lib.* 1749. *A. fol.* 433.)

VOL. I. page 396.—Jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress.

Wind-falls of timber, and other casualties, to whom the property belongs. Tenants for life. Remainder men, &c.

NOTES AND OBSERVATIONS.

NOTWITHSTANDING what Lord *Hardwicke* is reported to say, p. 396, as to there being "no judicial determination unto whom timber blown down, or cut by a stranger, would belong," Lord *Talbot* had expressed his decided opinion upon the point in coincidence with that of his Lordship, as stated in the same page; adding, "that it was so decreed upon occasion of the great wind-fall of timber on the *Cavendish* estate." Vide *Bewick v. Whitfield*, 2 *P. W.* 241; and 3 *P. W.* 267, 268. See, as to the case of *Bewick v. Whitfield*, note (1) to Mr. *Cox's* fifth edition, 3 *P. W.* 268; from whence it appears, that the Reporter had mistaken some very material circumstances of it.

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Where the tenant for life has also in himself the next
 [176] existent state of inheritance, subject to interme-
 diate contingent remainders, he shall not take
 advantage of his own wrong in cutting down
 timber; but the Court will preserve it for the benefit of
 the contingent remainder-men. *Williams v. D. of Bol-*
ton, cited 3 *P. W.* 268, note.

So, likewise, where timber is cut down by a combina-
 tion between the tenant for life and the person who has
 the next vested estate of inheritance. See 3 *Wood.* 400;
 3 *Atk.* 210, 211; *et vide Garth v. Cotton*, 1 *Ves.* 524,
 546, &c.; and 10 *Ves.* 278, 279.

COCKING *versus* PRATT, March 7, 1749-50.

(*Reg. Lib.* 1749. *A.* fol. 287.) .

VOL. I. page 400.—Relief against agreement made under a mis-
 conception of right.

Agreement as to distribution of personal estate set aside, although
 ratified; the value appearing much greater than was known to
 the plaintiff at the time.

Plea of inventory delivered and approved, and of agreement
 thereon founded, without fraud, &c.

NOTES AND OBSERVATIONS.

(1) THE bill (*inter alia*) alleged, that the defendant,
 who, as administratrix, ought to have accounted with her
 daughter for two-thirds of the intestate's effects, concealed
 the amount thereof from her, and gave her no account of
 several large sums out on mortgage, &c. to the amount of
 3000*l.*; and that such part of the effects as was valued by
 the defendant was greatly under-valued; and that the de-
 fendant, pretending great kindness for her daughter, as-
 sured her she would get in the personal estate, and make
 her full satisfaction for her full share; and some time after
 acquainted her that, in order the better to secure to her
 her two-thirds of the personal estate; and to put it out of

her own power to deprive her thereof, she would enter into an agreement with her for that purpose: ' and that about three months after the daughter's [177] attaining 21, the defendant procured articles to be drawn, and two parts thereof to be engrossed, without her daughter's perusal or examination; whereby the defendant covenanted, that she would, within one month after the date thereof, pay, or cause to be paid, to her daughter, the sum of 1000*l.* to her own use and disposal; and would, within one month then next, or so soon after as good security could be found, with her daughter's approbation, place out and settle a further sum of 1000*l.* in the names of *T. S.* and *B. P.* upon trust, as to the interest thereof, for her own use for life; and as to the principal &c. after her own death, in trust, for her daughter, her executors, &c. to be disposed of as she should appoint; and that she, the defendant, would release to her daughter her right of dower, or thirds, out of certain copyhold estates: and that the daughter thereby covenanted that she would accept of the above considerations in full satisfaction and recompense of her right of two-thirds of the personal estate, &c.; and would release to her mother all further claim therefrom. One of which articles, so engrossed and produced, was executed by the daughter, who wholly depended upon, and trusted in, her mother's pretended kindness and affection, &c. &c. without knowing the true value of her father's personal estate, or having any account thereof, &c. That the defendant not only refused to pay her daughter the 1000*l.* in money until after her intermarriage, but had refused to settle the further stipulated sum of 1000*l.* and to release her dower; and had refused to discover the particulars of the personal estate, &c. That the defendant, [178] after the execution of the articles, carried it very unkindly to her daughter, and married one *Pratt*, and left her daughter to shift for herself, and refused to pay

any money for her subsistence. That soon after the plaintiff's marriage with the daughter, they both applied to the defendant for an inventory and account, &c. that they might be satisfied for two-thirds of the clear amount. That the defendant afterwards paid to the plaintiff and his wife 1000*l.* and promised to give them an inventory and account, &c. and pay them them two-thirds of the real value thereof. That the plaintiff, since his wife's death, likewise had applied for such inventory and account, and to be paid two-thirds, &c. &c. The plaintiff then charged, that there was a recital in the defendant's marriage articles with *Pratt*, that she, the defendant, was entitled in her own right, to a personal estate to the amount of 1000*l.* and upwards, over and above the part or share of her daughter, being two-thirds of his personal estate, he dying intestate; whereby it was evident, that the personal estate amounted to 3000*l.* at the least; whereas by the articles, only 1000*l.* was allowed to the plaintiff's wife in present, and the defendant had taken to herself the interest of the 1000*l.* mentioned in the second instance, during her life, which ought to have been immediately paid to the plaintiff's wife, supposing the intestate had died worth only 3000*l.*; and that as to the release of dower, the yearly rent of all the copyhold premises was not 30*l.*; and that she had not even performed that part of the articles.

[179] The defendant, by her plea, (which had been allowed on argument,) as to such part of the bill as sought any discovery of the intestate's personal estate, or to set aside the articles, insisted, that she caused an inventory and an appraisement to be taken of the intestate's estate and effects, which appraisers were chosen by the plaintiff's wife; and that afterwards the defendant delivered such inventory to her, who kept the same till her marriage; and that such inventory was a full and true inventory; and that the plaintiff's wife carefully examined

the same; and, being thoroughly apprised of the value of her late father's personal estate, she executed the agreement mentioned in the bill. That her daughter fairly and voluntarily executed the articles, without any fraud or collusion of the defendant; and that such articles were drawn by her daughter's desire, and that she was fully apprised thereof, and held the same, or the draft thereof, in her custody a month before the execution thereof, and was not any ways imposed upon therein. That after the plaintiff's marriage she paid them 1000*l.* in pursuance of the articles. That the plaintiff, having accepted a performance of the agreement, ought not to be at liberty to controvert it; and that she was willing to perform the other parts of the agreement which were to be performed by her; and that the provision made by the articles for the plaintiff's wife were more beneficial to her, and amounted to more than her two-thirds of the personal estate would have done. That having made the agreement, she did not keep any account of the personal estate, and she apprehended the plaintiff was not entitled there- [180] to. The defendant put in an answer likewise relative to the copyholds, &c. She afterwards put in a second answer, setting forth the inventory and appraisement, and an account of her disbursements, by way of schedule. And she admitted having put out to interest, unknown to her husband, a sum of 200*l.*; and she said, that the plaintiff's wife was privy to such transaction.

The decree was stated in the report. *Reg. Lib.*

LONGUET *versus* SCAWEN, March 10, 1749-50.

(*Reg. Lib.* 1749. *B. fol.* 130.)

VOL. I. page 402.—Grant of annuities during life of the grantee, in satisfaction and discharge of a debt, the grantor not to be liable personally, but reserving a power to re-purchase and re-

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deem the annuities. Held part of the personal estate of the grantee, and similar to the case of Welsh mortgages.

NOTES AND OBSERVATIONS.

THE bill was filed by the testator's surviving executor, &c. against the surviving trustee of the two terms of years, and the testator's heirs at law.

The decree declared, that the annuities were redeemable, and ought, in a Court of Equity, to be considered as part of the testator's personal estate, &c.

Coventry v. Coventry, stated page 404, is also in 2 *Atk.* 366. "The facts of this case are very fairly stated in *Atkyns*, but the judgment is probably better given in Mr. *Jodre's* notes." Per Lord *Eldon* C. 10 *Ves.* 616.

[181] *BROWN versus PRING, March 12, 1749-50.*

(*Reg. Lib.* 1749. *A. fol.* 423.)

Undue influence and misrepresentation.—Solicitor in a cause charged with interest on money directed to be laid out for an infant's benefit, notwithstanding a deed from his grand-mother giving other monies in trust for the infant, and directing that he should not be so chargeable. Stated accounts set aside; the items being very gross, and the settlement obtained from a person just come of age under a misrepresentation. Bond obtained from the infant's grandmother for the amount of bill of fees and disbursements, directed to stand as a security for monies justly due on account, and the bill ordered to be taxed.(1)

NOTES AND OBSERVATIONS.

(1) THIS point appears only in *R. L.*

WRIGHT versus WRIGHT, March 15, 1749-50.

(*Reg. Lib.* 1749. *B. fol.* 273.)

VOL. I. page 409.—S. C. 1 *Ves.* 326.(1) Devise of land on contingency to Robert, "or his heirs." Robert, before the contingency happens, conveys "all his right, title, claim, and

demand"(2) therein, by deed, to his younger son, and his heirs, as a provision, and dies. The contingency happening, Robert's heir(3) cannot claim this against his father's act. "Or" construed "and."

NOTES AND OBSERVATIONS.

(1) THIS is the same case which is entered anonymously in 1 *Ves.* 326; as to which, vide the note, *antea*, 158; from whence it appears, that the plaintiff, having obtained the decree now reversed, which he was doubtful of supporting, had enrolled it too rapidly.

(2) The bill was filed by the heir of *Robert*, against *George*, the younger son, unto whom the conveyance had been made.

(3) The cause came before the Court by way of appeal, the Master of the Rolls having decreed in favour of the plaintiff. That decree was reversed, and the bill dismissed with costs. *Reg. Lib.* Vide 1 *Ves.* 326, *et antea*, 158.

The petition of appeal stated, (*inter alia*) that [182] *Robert* had provided for the plaintiff, his eldest son, by conveying to him, on his marriage, all his real estate, of which he, *Robert*, was tenant for life, reserving only a small annuity thereout for his life; and that the defendant, who was his only younger son, was unprovided for, except by the conveyance in question. The main *gravamen* insisted upon by that petition was, "for that the premises in dispute, under the contingencies in the will of the testator, were by *Robert* conveyed to the defendant, his younger son, as a provision for him," &c. &c. *R. L.*

Hobson v. Trevor, cit. p. 410, was decided by Lord *Macclesfield*, 2 *P. W.* 191.

Beckley v. Newland, cit. *ibid.* is in 2 *P. W.* 182.

Harvey v. Harvey, cit. *ibid.* is in *Barn. Ch. Rep.* 109.

ATTORNEY GENERAL *versus* SCOTT,
February 23, 1749-50.

VOL. I. page 413—Presentation to a living. Twenty-five trustees were to meet, and to present and elect a clergyman—one dies; the rest are equally divided; half being in favour of A. the rest voting for B. Upon the death of the supporters of the latter, the friends of A. meet and sign a presentation for him. This is void at law, and cannot be supported in Equity.

There should have been a distinct notice for the meeting of all.

A direction that the trustees should meet for such purpose “within four months” from the death of an incumbent, does not prevent their meeting after that time.

Trustees cannot make proxies to vote in such a personal trust as the above; though, if a choice were regularly made at a proper meeting, they might for the mere purpose of signing the presentation.

Disusage evidence of abandonment by consent, as to part of a constitution, which arose from consent.

NOTES AND OBSERVATIONS.

THE case cited of *Attorney General v. Foley*, page 418, as in *Dom. Proc.* is reported 7 *Bro. P. C.* 249, octavo edit.

Attorney General v. Davy, cited p. 419, is in 2 *Atk.* 212.

[183] **AVELYN *versus* WARD, March 19, 1749-50.**

(*Reg. Lib.* 1749. *A. fol.* 286.)

VOL. I. page 420.—Devisee, on condition that the land should go over to another if he did not give a release in three months after testator's death; dying in the testator's lifetime, the devisee over shall take instead of the heir at law. This being a conditional limitation, and not a strict condition. (1)

Specific legacies of stock, et c contra. (2)

NOTES AND OBSERVATIONS.

(1) THE third edition refers to 3 *Lev.* 125. 2 *Str.* 1092. *Warne*, 400. *Doug.* 63. 1 *Wils.* 107. 3 *Burr.* 1624. 3 *Atk.* 315.

Et vide *Thellusson v. Woodford*, 4 *Ves.* 227; and Mr. *Hargrave's* argument.

Jones v. Westcomb, cited page 421, is in *Prec. Ch.* 316 and 1 *Eq. Ab.* 255. As to *Andrews v. Fulham*, cit. *ibid.* vide 1 *Wils.* 107. 3 *Burr.* 1624. *Fonnereau v. Fonnereau*, cit. *ibid.* is in 3 *Atk.* 315. As to *Gulliver v. Wicket*, cit. *ibid.* vide 1 *Wils.* 105. *Townsend v. Ashe*, cit. p. 422, is in 3 *Atk.* 336.

It should be observed, that the case commented on in the third edit. of Mr. *Vesey's Reports* (the Irish edition,) in the note attached there to p. 422, namely, that in 2 *P. W.* 390, was said by Lord *Thurlow*, C. to be misconceived by the Reporter from beginning to end, and was no authority for any one point; and also, that all the remainders were vested, and should have taken [184] place. See 3 *Bro.* 397.

(2) One of the bequests in the principal case was of "2000*l.* in the stock or funds, commonly called S. S. Annuities, to trustees, in trust, to pay the produce thereof to the use of the defendant *F. W.* for life; and after her decease to retain 1000*l.* part thereof, in trust, for his niece, the plaintiff *F. A.* and to pay the dividends thereof to her during her coverture; and after such coverture 'to transfer' to her the 1000*l.* if living; and if dead, as she should appoint, &c. The remaining 1000*l.* part of the said 2000*l.* the testator gave, after the death of his sister, to others."

Another bequest was, "1200*l.* of the stock, called S. S. Annuity Stock, in trust, for the sole use of the plaintiff *F. A.*" subject to certain trusts and appointments before-mentioned in his will as to other bequests. *R. L.*

Ashton v. Ashton, cit. page 404, 405, is in *Ca. T. Talb.* 152, and 3 *P. W.* 384.

Partridge v. Partridge, cit. p. 426, is in *Ca. T. Talb.* 226.

PLUMMER *versus* MAY, *March 22, 1749-50.*

(*Reg. Lib. 1749. B. fol. 250.*)

VOL. I. page 426.—A mere witness cannot be made a defendant for discovery of what he is examinable to; unless he is interested. If the bill charges he is interested, the defendant must plead and support it by an answer denying that allegation; and cannot demur.(1)

A party cannot examine his own witness upon a *voir dire*.(2)

NOTES AND OBSERVATIONS.

(1) SEE, however, *Fenton v. Hughes*, 7 *Ves.* 287; *et per Lord Eldon*, C. in that case, *ibid.* 289, 290.

There is no further entry in *Reg. Lib.* than that the demurrer was over-ruled.

(2) See 7 *Ves.* 290.

STAPLETON *versus* CONWAY, *March 30, 1750.*

(*Reg. Lib. 1749. B. fol. 584.*)

VOL. I. page 427.—Money charged on an estate in Nevis held to carry only English interest.(1) This sum, which was charged in favour of W. held to be included in the bequest of a larger sum to W.'s younger children, the testatrix supposing that they were entitled to the charge, although it was not the case, and decreed that no more should be raised than the sum bequeathed.

Plate passes under a bequest of "household goods."

NOTES AND OBSERVATIONS.

(1) As to the first point, the Court declared, "that by the true construction of the trust of the term of three hundred years, the said sum of 2000*l.* ought to carry interest only after the rate of 5*l. per cent. per annum.*"

Upon the general question of West India interest, see *Raymond v. Brodbelt*, 5 *Ves.* 199, and *Bourke v. Ricketts*, 10 *Ves.* 330, 331, &c.

The annuity mentioned at the end of the report was of 500*l.* *per annum*, payable quarterly, and was granted by a deed, in which it was declared to [186] be in lieu of interest, upon a principal sum of 11,000*l.* thereby secured.

There were other questions in the cause; one of them was, whether the above-mentioned sum of 2000*l.* which was charged in favour of Sir *William*, upon the inheritance of Lady *Frances Stapleton*, his mother, should not be deemed as part of a sum of 3000*l.* given by her will to Sir *William's* grand-children. Sir *William* had died.

Lady *Frances*, by her will, declared "her intention was, that the 3000*l.* [before] given to her grand-children, the younger children of Sir *William*, should be accounted for payment of the sum of 2000*l.* charged on the plantation at *Nevis*, and payable to her said grand-children."

The plaintiffs, who were Lady *Frances's* co-heirs, "insisted, that in case the 2000*l.* payable to Sir *William* at 21 years, chargeable on the *Nevis* plantation (the inheritance of Lady *Frances*,) were taken to be part of Sir *William's* personal estate; then the 3000*l.* given by the will of Lady *Frances* to the younger children of Sir *William*, ought to sink, and not be raised; or, in case it were, that part ought to be paid to the plaintiffs.

The decree declared, that "it appeared to have been the intention of Lady *Frances Stapleton*, in her will, to comprehend and include the 2000*l.* and interest, in the legacy of 3000*l.* and interest, so given; and that no more than the said 3000*l.* and interest, should be answered out of her estate;" and therefore ordered, that "so much as the Master should find due for the 2000*l.* [187] and interest, should be deducted out of so much as should be found due for the 3000*l.* and interest, and paid to Sir *W.'s* personal representative; and that the residue of the 3000*l.* and interest should be divided be-

tween the surviving younger children of Sir *William*, and the representative of another of them who had died."

Another question was, whether plate passed under a bequest of household goods and furniture, which should be at the testatrix's house at *A.* at her death :

And the Court declared, " that such plate passed as was commonly used in the testatrix's dwelling house at *A.* at the time of her death." *Reg. Lib.* Vide 2 *Roper on Leg.* 239.

The Editor has searched the Registrar's books for the space of ten years, in hopes of finding the question of interest upon the arrears of the annuity decided, but without success. He found, nevertheless, that upon the cause coming on for further directions, the Master was directed to revise his report. *Reg. Lib.* 1752. *B. fol.* 50.

It seems, however, that the further agitation of this question must have been rendered unnecessary; since the Editor finds that certain variations were made in the original decree, in consequence of a petition of re-hearing relative (*inter alia*) to the application of the above mentioned arrears; after which there appears the following clause, *viz.* " But the defendants are to pay to the plaintiffs the sum of 20*l.* in satisfaction of their costs of so much of the proceedings before the Master as are be-
[188] come useless by the directions hereinbefore given." *Reg. Lib.* 1752. *B. fol.* 129, 131.

As to there being no interest given upon arrears of annuities, see *D. Bedford v. Coke*, 2 *Ves.* 117, *et postea*, () and the notes on *Morris v. Dillingham*, 2 *Ves.* 170, *postea* (); also 2 *Ves.* jun. 163, 164, 166, 167.

VERNEY *versus* VERNEY, April 2, 1750.

(*Reg. Lib.* 1749. *B. fol.* 262.)

VOL. I. page 428.—S. C. Amb. 88.—Leasehold interest. Contribution and apportionment for renewal.(1)

Revocation pro tanto.(2)

No contribution from an annuitant for life out of leasehold renewable interests.

Revocation.(2)

Revocation, by a codicil directing a sale or mortgage to pay debts, merely pro tanto.

NOTES AND OBSERVATIONS.

THIS case was determined on consent. Vide *Amb.* 88; and 9 *Ves.* 557.

The rule determined by Lord *Hardwicke* as to tenant for life contributing one-third of the charges on a renewal, does not now prevail.

Where no inference is to be collected from a will under which the successive bequests are taken, an apportionment is to be made according to the benefit actually taken by the parties; the tenant for life keeping down the interest. Vide *Nightingale v. Lawson*, 1 *Bro.* 440. *Stone v. Theed*, 2 *Bro.* 448. *White v. White*, 4 *Ves.* 24, 33. Affirmed on appeal by Lord *Eldon*, C. 9 *Ves.* 554, quod vide. Sed vide *ibid.* 560.

Notwithstanding the above, it may be observed, that in the case of an annuity for life given out of a leasehold renewal interest, the annuitant is bound to contribute. Vide *Maxwell v. Ashe*, 1 *Bro.* 444 (note); and 7 *Ves.* 184; and *Moody v. Matthews*, 7 *Ves.* 174.

(2) As to the point of revocation; the estate [189] was devised by the will as follows: "I give my estate at O. chargeable, nevertheless, with my debts, to my dear wife for her life; remainder to my son, in tail general;" with other remainders over. But the testator, by a codicil, devised his rectory, &c. and all his lands, tenements, &c. which he held in fee simple in Great Britain to *H.* his heirs and assigns, upon trust, by mortgage or sale thereof, to raise such money as should be necessary for the more easy and effectual payment of his debts."

It appears that a question was made at the hearing of

this cause, whether the codicil did not amount in Equity to a revocation of the devise in the will, as to the estate at O.

The Court declared, "that the codicil was in Equity a revocation of the devise, so far only as to enable *H.* the trustee, to mortgage or sell the same to raise money for the more easy and effectual payment of the testator's debts; and that the surplus thereof passed by the devises in the will." *Reg. Lib. ubi supra.*

EARL OF PORTSMOUTH *versus* LORD EFFINGHAM,

May 9, 1750.

(*Reg. Lib. 1749. A. fol. 668.*)

VOL. I. page 430.—Vide 2 *Stra.* 1267.—Bill of review on new matter. Questions as to legal and equitable recoveries, and trustees to support contingent remainders.

Duty of trustees to preserve, &c.

Bill of review on new matter.

NOTES AND OBSERVATIONS.

SEE 1 *Ves.* 30.

As to *Hopkins v. Hopkins*, cit. p. 431, vide 1 *Ves.* 268, 269, and 1 *Atk.* 581.

[190] *Chapman v. Blisset*, cited *ibid.* is in *Forr.* 145.

Norris v. Le Neve, cit. p. 432, is in 3 *Atk.* 26, 39, and 2 *Bro. P. C.* 73, octavo edit.

Casburn v. English, cit. p. 433, is in 1 *Atk.* 603.

Hearle v. Greenbank, cit. *ibid.* is in 1 *Ves.* 298.

See towards the top of p. 434, as to the insertion of trustees to preserve contingent remainders. It is their duty never to permit a tenant for life or years to bring forward a remainder to himself or another, by the destruction of that estate. Vide per Lord *Eldon*, C. 10 *Ves.* 278; et vide *Garth v. Cotton*, 1 *Ves.* 524, 546.

See page 435. A bill of review, or a supplemental bill in nature of it, to reverse a decree upon the discovery of new matter, must have the previous leave of the Court; and this will not be granted but upon affidavit that the new matter could not be produced or used, at the time when the decree was made.

Vide *Mitf* 78; and *Cole v. Gibson*, 1 *Ves.* 504, *et postea*.

POTTER *versus* POTTER, May 17, 1750. [191]

(*Reg. Lib.* 1749. *B. fol.* 547.)

VOL. I. page 437.—Vide S. C. 3 *Atk.* 719, and *Amb.* 98, upon other points.

Lands agreed to be purchased, pass by general words in a will, such as “or elsewhere.” Republication by a codicil.(1)

NOTES AND OBSERVATIONS.

(1) VIDE *Gibson v. Lord Montfort*, 1 *Ves.* 485. 2 *Wood*, 366; and *Pigott v. Waller*, 7 *Ves.* 98.

Martin v. Savage, cit. p. 440, is in *Barn. Ch. Rep.* 189.

SANSUM *versus* BRAGGINGTON,

May 15 and 31, 1750.

(*Reg. Lib.* 1749. *B. fol.* 373.)

VOL. I. page 443.—Rolls. A ship pledged abroad by the master for expenses, &c. well hypothecated, and the part-owners liable each for the whole demand.(1)

Del credere.

NOTES AND OBSERVATIONS.

(1) As to the liability of the owners, &c. to demands for repairs of the ship at home, &c. where no hypothecation, vide *Buxton v. Snee*, 1 *Ves.* 154, 155, 156, *et antea*, 84.

In the principal case, *Braggington* and *Pitman* were the sole owners, and *Pitman* was the Master.

The vessel was repaired, refitted, and supplied by the plaintiff at Jamaica for her homeward bound voyage: in the prosecution of which she was taken by the French.

The bill stated the circumstances, and the deed of hypothecation, alleging, that by the capture and
 [192] condemnation, the hypothecation of the ship became, as such, frustrated; and that the plaintiff, being deprived of that additional security, was left wholly to depend on the defendant *B.* and *Pitman* for re-payment. It then alleged, that *B.* and *P.* had fully insured the ship and freight, and they had afterwards recovered the full amount from the underwriters: and it stated, that *Pitman* had died on the coast of Guinea. His representative was brought before the Court.

The defendant *B.* admitted he had insured the ship and freight, and had received the amount from the assurers; but stated it as 2000*l.* short of his interest in the ship, cargo, and freight. He stated, that he looked upon himself as not liable to pay the plaintiff's demands, since he had reason to believe, from a letter of *Pitman's*, that the plaintiff had an allowance made him of 20*l. per cent.* or more, on money by him advanced, in case he did advance any, for the repairs, &c.: which he hoped to prove was added to the moneys so advanced by him, and actually made the consideration of the instrument of hypothecation: and he insisted, that according to the custom of merchants, allowance after the rate of 20*l. per cent.* was to be understood, and taken, to be made and given with intent that the party to whom such allowance is made should take the risk of the ship, freight, &c. so hypothecated, upon himself, and become, and be in the nature of, an insurer to himself for ship, freight, &c. so hypothecated, to the amount of the sum advanced.

The Court declared, "that the demand of the plaintiff for the money advanced or laid out by him in the refitting or furnishing with provisions or stores of the said ship, ought to be established against the defendants *Bragginton* and *N.* [*Pitman's* administratrix,] according to the proportions of their interests in the ship; (that is to say) as to the defendant *N.* as administratrix of *J. P.* for one-eighth out of the assets of her intestate; and as to the defendant *B.* for the other seven-eighths." And it was referred to the Master "to reduce the plaintiff's demand from Jamaica currency to sterling money, and to charge the defendants *B.* and *N.* with their proportions thereof; and the defendant *B.* was to answer what the Master should certify was his proportion thereof: and the defendant *N.* was to answer what, &c. out of her intestate's assets, as a simple-contract debt, in a course of administration; and if she did not admit assets she was to come to an account. But the Master was to inquire whether any thing, and how much, was due from the plaintiff for freight of any goods loaden by him, or on his account, or otherwise, on the outward bound voyage; and if he should find any thing so due, he was to deduct the same proportionably out of each part of the plaintiff's demand against the respective defendants; and in case the plaintiff should not be able to procure satisfaction for the one-eighth part of his debt, out of the assets of the intestate; then the defendant *B.** was to make him satisfaction for the same, or so much thereof as he should not procure satisfaction for." *Reg. Lib.*

* The Law seems now settled, contrary to this part of the decision, and to that of *Doddington v. Hallet*, 1 *Ves.* 497: so that part-owners are not to be considered as partners: or answerable for more than their respective shares and interests. See the note on *Buxton v. Snee*, *antea* 84, and on *Doddington v. Hallet*, *postea* 205.

PENN *versus* LORD BALTIMORE,

May 15, 1750.

(*Reg. Lib.* 1749. B. fol. 439.)

VOL. I. page 444.—Specific performance of articles executed in England concerning boundaries of lands abroad. (1)

Agreements to settle disputes.

Process on a decree for possession of land. (2)

NOTES AND OBSERVATIONS.

(1) SEE in *Barclay v. Russell*, 3 *Ves.* 431, &c. and *Nabob of Arcot v. E. I. Company*, 1 *Ves. jun.* 371; and 2 *Ves. jun.* 56.

The Court will relieve as to the settlement of disputes, although it may afterwards appear that one of the parties had no title, if no fraud.

Stapilton v. Stapilton, 1 *Atk.* 2. *Frank v. Frank*, 1 *Ch. Ca.* 85. *Cann v. Cann*, 1 *P. W.* 723, 727.

Pullen v. Ready, 2 *Atk.* 592. *Goilman v. Battinson*, 1 *Vern.* 48. *Cory v. Cory*, 1 *Ves.* 19. See 2 *Ves.* 284.

(2) See page 454.

“After service of writ of execution of a decree for delivery up of possession of lands, the Court will grant an injunction on a motion of course; and the writ of assistance to the sheriff is founded on it.” In *Huguenin v. Bazely*, 15 *Ves.* 180.

The directions in the principal case being particular, and as they may be possibly useful, at some time, to the profession, the author has subjoined them.

The Court declared, “that the articles of agreement were valid and obligatory upon the parties who executed the same, or the indorsements thereupon, and
[195] their heirs and assigns; and that the said articles ought to be specifically executed and performed by and between the said parties respectively; notwithstanding that the several periods of time thereby

limited for doing and performing divers matters and things therein mentioned and agreed upon were elapsed ; but that the said articles did not bind or prejudice any prerogative, property, title, or interest of the crown, in or to the territories, districts, or tracts of land, comprised in the said articles, or any part thereof ; nor any estate, right, interest, or possession of any of the planters, proprietors, tenants, or occupiers of any lands or tenements within the said territories, districts, or tracts of, in, or to any lands, tenements, or hereditaments lying within the same, which the parties aforesaid had not a right or power, by virtue of the respective charters or grants under which they claimed, to bind or conclude : and it was therefore decreed, that the said articles, and the several matters and things therein contained, should be performed and carried into execution by and between the said parties, and every of them ; and to that end, that the plaintiffs *T. P.* and *R. P.* the father, in their own right, and as standing in the place of *J. P.* deceased ; and the defendant the Lord *B.* should respectively, before the end of three calendar months from that day, execute, under their hands and seals, two several proper instruments, appointing and authorizing proper persons, not more than seven on each side, with full powers to the said seven persons respectively, or any three or more of them, for the actual running, marking, and laying out the part of a circle, and the several lines in the said articles [196] mentioned : and such commissioners were to give due notice to each other, and to fix and agree upon a time or times to begin and proceed in the running, marking, and laying out the same.

And it was further ordered, that the same should be begun, at the furthest, some time in the month of November then next, and be proceeded in according to the said articles ; and that the said lines should be marked out by visible stones, posts, trees, pillars, buildings, land-marks,

or other certain boundaries, which might remain and continue; and that such boundaries should be marked on one side with the arms of the defendant the Lord *B.*; and on the other side, with the arms of the plaintiffs the *Penns*; and that such lines should be completely so run, marked, and laid out, on or before the last day of April, 1752; and when so done, that a true and exact plan and survey thereof, with the best, and most exact, and certain description that could be given of the same, should be made up, signed, and sealed by the commissioners on both sides, and by their principals, and be entered in all the public offices in the provinces of Maryland and Pennsylvania, and the three lower counties of Newcastle, Kent, and Sussex; and that a true copy of such respective instruments for appointing commissioners, when prepared, should be delivered by the solicitor of the one party, to the solicitor of the other party; and in case the parties should differ about such instruments, or either of them, the Master was to settle the

same. "And two questions in particular having
[197] been raised in America, by the commissioners formerly appointed by the defendant Lord *B.*

and being then made in the cause, *viz.* where the centre of the circle, agreed by the said articles to be drawn about the town of Newcastle therein mentioned, ought to be fixed; and whether the said circle ought to be of a radius or semi-diameter of twelve miles, or only of a periphery of twelve miles; and a third question being also made in the cause, *viz.* at what place the Cape, called in the said articles, Cape Hinlopen, is situated; his Lordship declared he was of opinion, that, according to the true intent and construction of the said articles, the centre of the said circle ought to be fixed in the middle of the town of Newcastle, as near as the same could be computed; and that the said circle ought to be of a radius or semi-diameter of twelve miles; and that Cape Hinlopen ought to be deemed and taken to be situated where the same is laid down and

described in the map or plan annexed to the said articles to be situated; and therefore his Lordship further decreed, that the said articles should be carried into execution accordingly; and that after the said limits and boundaries should be so set out and ascertained by the commissioners, the plaintiffs *T. P.* and *B. P.* the father, in their own right, and as standing in the place of *J. P.* deceased, and the defendant Lord *B.* should respectively release and convey to each other, and their heirs, their respective rights, titles, interests, powers, prerogatives, claims, demands, and pretensions, in or to the respective territories, districts, and lands severally allotted to them, according to the tenth article contained in the [198] said articles of agreement, at the costs and charges of the person or persons to whom such release and conveyance should be made; and the Master was to settle such releases, &c. if the parties differed, &c.; and all proper parties were to join, &c. But the decree was to be without prejudice to any prerogative, power, property, title, or interest of his Majesty, his heirs and successors, in or to the said territories, districts, or tracts of land, or any part thereof; and also to any estate, right, interest, or possession of any of the planters, &c. [as before.] And in case his Majesty, his heirs or successors, should insist upon any power, title, or right whatsoever, either on behalf of his Majesty, his heirs or successors, or of any of his or their subjects, residing in, or being possessed of, or interested in, any lands, tenements, or hereditaments, lying within any of the said territories, districts, or tracts of land, so as to hinder, obstruct, or interrupt the effectual execution or performance of the said articles, or any part thereof; then, and in every such case, any of the parties were to be at liberty to apply, from time to time, &c. And his Lordship reserved the consideration of any further or other directions to be given as between the plaintiffs and the defendant Lord *B.* and the defendants claiming under

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W. B. Esq. deceased, upon any such application." The defendant *Lord B.* was directed to pay the plaintiff his costs up to the hearing, as mentioned in the report; and further directions were reserved until the time limited by the decree for performance of the articles should be expired," &c. *Reg. Lib. ubi supra, fol. 456, 457.*

[199] *WEST versus SKIPP, May 16, 1750.*

(*Reg Lib. 1749. B. fol. 519.*)

VOL. I. page 456.

NOTES AND OBSERVATIONS.

THE Master was also to inquire "whether the sum of 1111*l.* 19*s.* 11*d.* mentioned in the assignment made by *I. S.* officer of the customs, to *E. S.* and *M. H.* was advanced, or paid by the said *E. S.* and *M. H.* or either of them, or by the defendants *R. H.* or *J. H.* and *John Sleor-gin*, or any of them? And whether the money so advanced, was really and truly the money of the said *E. S.* and *M. H.* or either of them, or belonging to the partners, or to the said *G. H.* and *R. H.* or either of them separately," &c.

BAKER versus PAINE, May 21, 1750.

VOL. I. page 456—Agreement. Admission of parol evidence, 'where fraud or surprise.

NOTES AND OBSERVATIONS.

THE case referred to page 457, as in Mich. 1746, is *Joynes v. Statham*, 3 *Atk.* 388. On which case see observations by Lord *Rosslyn* and Lord *Eldon*, C. 4 *Bro.* 518, and 6 *Ves.* 325, note.

As to the points of law there noticed, vide also in *Wal-*

her v. Walker, 2 *Atk.* 100. *Woollam v. Hearn*, 7 *Ves.* 211, 219, 220, &c. and *Legal v. Miller*, 2 *Ves.* 199.

ROOK *versus* WORTH, May 23, 1750. [200]

(*Reg. Lib.* 1749. *B. fol.* 611.)

VOL. I. page 460.—A sum of 96*l.* paid to guardian of an infant tenant in tail for re-building a copyhold tenement that had been burnt down, but which had never been so applied during the infant's life, held to belong to the succeeding remainderman in tail, subject to a deduction of interest upon a larger sum at which the loss was computed. (1)

Such interest held to belong to the personal representatives as a compensation for the loss of the rents and profits sustained by the infant, who could not alien. (2) Questions as to infant tenants in tail.

NOTES AND OBSERVATIONS.

(1) It was declared "that the house admitted in the pleadings of the cause to have been burnt down, being a copyhold estate in tail, and the tenant in tail dying during his infancy, the plaintiffs and the defendant *R. C.* as issue in tail, are entitled to have a reasonable proportion of the sum of 96*l.* (which was allotted and paid for such loss) paid to them in order to the re-building of the said copyhold house so burnt down; and that under the circumstances of the case, the sum of 80*l.* ought to be considered as such reasonable proportion." And decreed that *Worth* and his wife should pay the same, &c. But in case *Worth* and his wife should give the plaintiffs any further trouble, the plaintiffs were to be at liberty to apply to the Court for their costs. *Reg. Lib.*

(2) As to the interest of infant tenants in tail, and questions arising thereon, vide *Ware v. Polhill*, 11 *Ves. jun.* 257, 274, &c. &c.

As to the Court's maintaining the real or personal estate of infants in *statu quo*, as mentioned in p. 461, vide 1 *Atk.* 480; *Witter v. Witter*, 3 *P. W.* 99, 100. 11 *Ves.*

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257, 278; and the *Countess of Shrewsbury v. Earl of Shrewsbury*, 1 *Ves. jun.* 227.

[201] GREEN *versus* RUTHERFORTH,

May 23, 1750, et postea.

(*Reg. Lib.* 1749. *A. fol.* 396.)

VOL. I. page 462.—Plea to jurisdiction.

NOTES AND OBSERVATIONS.

It appears from the Registrar's book, that about a month after the over-ruling of the plea, as mentioned at the end of the report, p. 475, Dr. R. not only acquiesced in the opinion of the Court as to the plea: but having signified to the plaintiff that he would not give him any further trouble in the cause, the Court, on his consent, ordered him forthwith to deliver up to the Master, &c. of *St. John's College* the presentation obtained by him from them, &c.; and ordered the said Master, &c. of *St. John's College* thereupon, forthwith to present the plaintiff, &c. *Reg. Lib. ubi supra.*

ANONYMOUS, *June 15, 1750.*

VOL. I. page 476.

NOTES AND OBSERVATIONS.

THIS motion is entered in the minute book as on the part of the "Dean of Durham."

[202] AMSBURY *versus* BROWN, *June 16, 1750.*

(*Reg. Lib.* 1749. *A. fol.* 591.)

VOL. I. page 477.—Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by reversioner after the wife's death, no interest allow-

ed to the husband during his wife's lifetime. (1) As to tenant for life keeping down the interest of an incumbrance. (2) Real estate rendered by a testator primarily liable. (3)

NOTES AND OBSERVATIONS.

(1) *VIDE Kirkham v. Smith*, 1 *Ves.* 258, *et antea*, 133.

(2) *Sarjeson v. Cruise*, cited p. 477, is S. C. with *Sergeson v. Sealy*, 2 *Atk.* 412; vide also *ibid.* p. 413, note (2), and *ibid.* p. 416, and note. Also *Revell v. Watkinson*, 1 *Ves.* 93, *et antea*, 66.

(3) Exoneration of personalty from debts, &c. must take place in consequence either of an express declaration in writing, or of a plain and necessary implication. Vide 1 *Roper on Leg.* 277, &c. *Et vide ibid.* 257, &c.

ASTLEY *versus* POWIS, June 23, 1750.

(*Reg. Lib.* 1749. *B. fol.* 662.)

VOL. I. page 483.—See also S. C. further, in 1 *Ves.* 495. Covenant, before the act reducing the rate of interest, to pay 6 *per cent.* is not prejudiced by the act: but interest turned into principal, by the course of the Court, was directed to carry interest at 5 *per cent.* only, from the passing of the act. Interest by course of the Court, discretionary.

GIBSON *versus* LORD MONTFORT, and [203.]
ROGERS *versus* GIBSON, June 25, 1750.

(*Reg. Lib.* 1749. *A. fol.* 583.—And *Reg. Lib.* 1752. *A. fol.* 259, 260.)

VOL. I. page 485.—S. C. 3 *Amb.* 93. *et vide* 4 *Ves.* 288, note. Devise of real, leasehold, copyhold, and personal estate to trustees, their executors, &c. first for payment of annuities, &c. upon a deficiency of the personalty; “and as concerning all the rest residue,” &c. in trust for the children of A. but if she die without issue, then to B. and C. The intermediate profits pass by this residuary devise. (1)

Not necessary the word “heirs” should have been inserted to carry the fee, for trustees have a fee when the purposes of the trust cannot be answered otherwise. (2)

Trust of copyhold deviseable without surrender. But otherwise as to copyholds of which the testator had the legal estate.

Lands agreed to be purchased after the will, and before the first codicil, pass by such codicil operating as a republication.

Q? Whether a codicil relating in its terms only to personal estate, and yet executed according to the statute of frauds, can operate as a republication of a will as to real estate after purchased. See *Piggot v. Waller*, 7 Ves. 98.

NOTES AND OBSERVATIONS.

AFTER the devise in the will in favour of the issue of the daughter, the testator thus expresses himself: "but having made no provision for the disposal of the residue of my said real and personal estates as aforesaid, in case my said daughter should die without issue, then, and in such case," &c. as in the report.

The testator, by the first codicil mentioned in the report, after reciting, "that he had by his will, given all the residue of his real and personal estate to *A.* and *P.* in case his daughter should die without issue, revokes that part of his will relating to *A.* and substitutes *S. S.* in his stead," &c. &c. *R. L.*

This is most material: and the decree seems founded on it. Vide *post*.

(1) As to cases on the accumulation of rents and profits, and otherwise, vide *Thellusson v. Woodford*, 4 Ves. 227, &c. *ibid.* 287, 288. *Mills v. Norris*, 5 Ves. 335. *Shepherd v. Ingram*, *Amb.* 448.

Hopkins v. Hopkins, cited p. 486, is in 1 Ves. 268, *Forr.* 44, and 1 *Atk.* 581, vide Mr. *Sanders's* edit.

[204] As to the difference between the word "residue," with reference to real or to personal estate, adverted to p. 486, see in *Durour v. Motteux*, 1 Ves. 322, *et antea*, (157) the note at the end of that case. *Carte v. Carte*, cited p. 487, is in 3 *Atk.* 174, and *Amb.* 28. *Martin v. Savage*, cited p. 489, is in *Bar. Ch. Rep.* 189. *Potter v. Potter*, mentioned *ibid.* is in 1 Ves. 437, *et antea*, 191.

As to trust estates in copyholds passing without surrender, vide *Allen v. Poulton*, 1 *Ves.* 121, *et antea*, (76); and *Tuffnell v. Page*, well reported *Barn. Ch. Rep.* 9, 12, 13.

The ultimate determination in the principal case, as to the accumulated rents and profits passing under the devise, was by way of re-hearing before Lord *Camden* C. on the 22d of May, 1767; upon the petition of the devisees of the heir, when his Lordship affirmed the decree. See *Ambler* 97, and the note to 4 *Ves.* 288.

Beside the inquiries mentioned in the report, p. 494, the Master was also to ascertain, "whether, if there were any such agreement as there mentioned, the same was before the testator's first codicil." The Master was also to inquire, "whether the testator purchased any other, and what freehold messuages and lands after the making of his first codicil, and before the time of making his second codicil." *Reg. Lib.*

It appears from the Master's report, dated in December, 1752, that the articles of agreement were executed before the date of the first codicil, and that the conveyance made in pursuance thereof, was executed after the first codicil, and before the date of the second.

The Court, therefore, on the 19th of March, [205] 1753, declared, that the lands so purchased, "passed to the devisees by virtue of the testator's first codicil, and the re-publication thereby made of the testator's will." *Reg. Lib.* 1752, *A. fol.* 259, 260.

BAXTER. versus KNOLLYS, June 27, 1750.

(*Reg. Lib.* 1749. *A. fol.* 467.)

VOL. I. page 494.—Bill for partition will lie as to tithes. Demurrer to such a bill overruled.

SANDS *versus* SANDS, June 28, 1750.

(*Reg. Lib.* 1749. *B. fol.* 403.)

VOL. I. page 495.—After leave given to bring an ejectment, a new ejectment cannot be brought without leave.

DODDINGTON *versus* HALLET, July 2, 1750.

(*Reg. Lib.* 1749. *A. fol.* 625.)

VOL. I. page 497.—Vide *Buxton v. Snee*, *antea*, 84. The doctrine in this case as reported, “that part-owners in a ship are partners, and liable in *solido*, for all goods furnished, and repairs done,” has been over-ruled, on great consideration. (1)

NOTES AND OBSERVATIONS.

(1) **VIDE** *per Lord Eldon, C. ex parte Young*, 2 *Ves. & Beames*, 242. *Ex parte Harrison*, in *M. of Nicholson*, 2 *Rose Rep. in Bankruptcy*, and *Brent v. Hay*, Feb. 10, 1815, which governed many other cases waiting that determination. **ED.**

It appears rather singular, that Lord *Hardwicke* should have said so much as is reported on the subject of the contractors being partners, since the agreement between them on the inception of the undertaking, negatives such a supposition as strongly as terms could make it, and since this very argument is pressed by the defendant's counsel, towards the top of p. 498.

The contract was in the following terms :

“2d April, 1747.—We, whose names are hereunto subscribed, do hereby authorise, empower, and appoint *Thomas Hall* to build, or contract and agree for building, for us a ship or vessel of the burthen, &c. whereof — is to go commander, to be intended for service of *East India Company*, and we do hereby severally, and not jointly, covenant and agree, every one of us, and for himself, to

and with the said *Thomas Hall*, not only to take and hold the several parts with our names hereunto written, of such ship as he the said *T. Hall* shall build, or contract or agree for building for us, as aforesaid, but also to pay our proportionable shares according to the several parts with our names hereunder written of the money as shall be paid or agreed to be paid for building such ship, and also of charges and disbursements that he shall expend or lay out, or cause to be expended or laid out, in or about the victualling, manning, or equipping out the said ship to sea, and that at such times, and in such manner and form, as he the said *T. Hall*, shall agree or contract for."

The case in *Reg. Lib.* as to its circumstances, founded on this agreement, is as follows:

It appears, that *Hall* had got a bill of sale from the builder of the ship, and having never made any bill of sale or assignment to the plaintiffs of their respective shares, or contributed any thing for or in respect [207] of ten 32 parts left unsubscribed for, the bill

"prayed, that the defendant might be decreed to assign or make bills of sale to the plaintiffs of their respective shares and interest in the ship, and to deliver up to them such general bill of sale, and that he might be restrained from making any assignment, or bill of sale, of the ship, or any part thereof, until the hearing of the cause, and might account with the plaintiffs for what *Hall* ought to have contributed towards the building and fitting out of the ship, in respect of the said ten 32 parts so left unsubscribed for, and might pay the same as the Court should direct: or, otherwise, that such ten 32 parts might be sold for that purpose, or assigned to the plaintiffs: and that the plaintiffs might be indemnified in such manner as the Court should think fit, from such tradesmen's debts as should appear to have been contracted on the ship's account by *Hall*."

The defendant admitted that *Hall* had received more on account of the ship than he had actually expended thereon, without contributing any thing for the remaining ten 32 parts; but he insisted that *Hall*, by purchasing and fitting out of the ship, and contracting debts on account thereof, to the amount of 7392*l.* which he at his death stood indebted, and personally liable to pay, as the contracting party therein, over and besides the monies actually paid by him on account thereof, he, *Hall*, might be said to have contributed more than his share and proportion of the costs and charges of building, &c. in respect of

the said ten 32 parts remaining undisposed of,
 [208] or unsubscribed for. The defendant, therefore, after stating that *Hall* died indebted to a much greater amount than his assets would extend to pay, insisted, that such ten remaining 32 parts belonged to *Hall* in his own right, as an original part owner, by virtue of the bill of sale, and as remaining to him undisposed of, and unsubscribed for, and for which he stood liable and engaged even beyond his share and proportion of the costs and charges, &c.; and as the plaintiffs could not (as the defendant apprehended) pretend to be entitled to the same, having subscribed for, or agreed to take, only their own particular parts, and that such remaining ten 32 parts were part of *Hall's* personal estate, and that *Hall* was under the bill of sale trustee for the plaintiffs, but not as to such ten two-and-thirtieth parts, and that the plaintiffs had not any specific lien thereon.

The decree directed an account of all dealings and transactions between the plaintiffs and *Hall* in his lifetime, and between them and the defendant, as his administrator, since his death, as partners in the ship, and in the building, equipping out, victualling and manning, and in the earnings of the said ship; in taking which accounts, the Master was to make all parties just allowances, and particularly an allowance to the plaintiffs of all sums of money

which they had paid, or were liable to pay, to any workmen or tradesmen for building, &c. or for seamen's wages; and in case it should appear that the defendant, as administrator of *Hall*, was a debtor to the plaintiffs upon the balance of such account, then the Court declared, that the plaintiffs had a specific lien upon the shares which *Hall* was entitled to in the ship at the time of his death, for so much as should be due to them upon the balance of that account; and in that case that the shares so belonging to *Hall* should be sold, &c. and the money arising, &c. should be applied in the first place, in payment of what should be so found due to the plaintiffs upon the balance of their said accounts, &c. But if the plaintiffs should be found to be debtors to the defendant, as administrator of *Hall*, upon the balance of the said account, &c. then what should be so found due from the plaintiffs respectively, should be paid by the plaintiffs respectively to the defendant. And in case, in taking the said account, any allowance should be made to the plaintiffs for any sum of money which they were liable to pay to such workmen, &c. and which they should not have actually paid, then the plaintiffs were to indemnify the defendant, as administrator, &c. and his estate therefrom.
Reg. Lib.

SEED *versus* BRADFORD, July 12, 1750.

(*Reg. Lib.* 1749. *B. fol.* 399.)

VOL. I. page 501.—Father having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it, during the daughters life. This held a satisfaction, and the husband not entitled.

NOTES AND OBSERVATIONS.

Wood v. Bryant, there cited, is in 2 *Atk.* 521.

PRYSE versus LLOYD, July 13, 1750.

(*Reg. Lib.* 1749. *B. fol.* 403.—and *Reg. Lib.* 1750. *B. fol.* 644.)

VOL. I. page 503.—Vide *S. C. 2 Ves.* 374,(1) et postea.()
As to a witness to a will being a creditor of testator(2) before the
Act 25 Geo. II. c. 6.

NOTES AND OBSERVATIONS.

(1) It appeared on the Master's special report, that the witness was not a creditor of the testator at the time of his second examination under the inquiries directed, as in the report p. 503: and it not appearing he was such a creditor at the time of his attesting the will, the Lord Chancellor said he would not enter into a minute inquiry about that, whether he was or no. Vide 2 vol. 374.

Since the decision of this case, the stat. 25 Geo. II. *ch.* 6, has removed all doubts as to the competency and credit of devisees or legatees who have beneficial interests given them, being attesting witnesses: and it seems to make a wise regulation as to the case of creditors. In the former instances, it makes the bequests in their favour utterly void. In the latter, it declares, that creditors shall be admitted as witnesses to prove the execution, &c. but provides that in either case the credit of the witness, and all the circumstances, shall be left to the Court and the Jury.

[211] **COLE versus GIBSON, July 18, 1750.**

(*Reg. Lib.* 1749. *A. fol.* 631.)

VOL. I. page 503.—Marriage—Brocade.(1)
Quare, Whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of plaintiff not having obtained leave of the Court, and made the usual deposit.(2)

NOTES AND OBSERVATIONS.

(1) *VIDE Scribblehill v. Brett*, 4 Bro. P. C. 144, octavo edition, and the note at the head of that case. *Hall v. Potter*, Show. P. C. 76. *Arundel v. Trevillian*, 1 Ch. Rep. 47. See also 1 Ves. 277, and 2 Ves. 549.

(2) It seems that such a demurrer would hold. See Lord Hardwicke's order, 2 Atk. 139, note. Vide also *Gould v. Tancred*, ibid. 534. *Wortley v. Birkhead*, 2 Ves. 571, 576, and 3 Atk. 809. *Moore v. Moore*, 2 Ves. 597, 598, *et postea*.

Such leave of the Court will not be granted, except upon affidavit that the new matter could not be produced, or used, at the time when the decree was made. *Mitford* 78, *et vide Ludlow v. M'Cartney*, 2 Bro. P. C. 67, octavo edit.

In the principal case, with reference to all the points, it appears that the trial did not come on till four years afterwards, viz. on the 23d of July, 1754; when, on the first issue, the jury found that the bond was not executed in consideration of or, &c. but that it was given to the defendant for her long and faithful services, and proceeded from the plaintiff B.'s wife's affection to her, and no other consideration.

On the second issue, they found that the 1000*l.* was not made payable by the bond, at or on the marriage of the plaintiff, but was made payable six months from the date thereof.

On the third issue, they found that the an- [212] nuity was not provided for, or granted to the defendant in consideration of the bond, or of procuring or assisting the plaintiff in his marriage, but that it was granted to the defendant out of real regard and affection for her, and not from any other motive or consideration.

The plaintiff, however, seems to have thought of a new trial; and it appears from the Registrar's book, that he, on the 12th of February, 1755, applied to the Court,

stating the above circumstances, and alleging that on the very morning of the trial, and not before, Mr. T. who formerly was his attorney, and prepared the marriage articles, but who had never been employed by him since, found a writing, or agreement, which the plaintiff had caused to be drawn up in the country, whereby he proposed to covenant, that if the marriage should take effect, he would, within six months after it, pay the defendant 1000*l.* and secure to her an annuity of 100*l.* for her life, which paper writing was offered, but through inattention was not read at the trial; and that, as the plaintiff apprehended, it manifestly appeared from such paper, that as well the bond as the annuity, was founded on a marriage brocage agreement; he had, therefore, filed his supplemental bill, to avail himself of such paper, and for a discovery touching the same, to which the defendant had put in a demurrer and answer, and had demurred to the whole relief, and not to any part of the discovery. And he stated that the cause of demurrer assigned was, that the plaintiff

ought not, by the rules of the Court, to exhibit [213] a supplemental bill, in the nature of a bill of review, without leave for that purpose, and making the usual deposit; and that defendant had obtained an order that the demurrer should be set down for argument at the same time with the original cause upon the equity reserved. The plaintiff then stated, that he had given notice of motion for a new trial, but was advised that the demurrer was necessary to be argued before either that motion, or the cause, should come on upon the equity reserved, inasmuch as the discovery made by the defendant in her answer might be very material on that motion, and probably put an end to the dispute. He therefore prayed and obtained an order that the demurrer might come on to be argued shortly. *Reg. Lib.* 1754, *A. fol.* 160.

No further entry appears relative to this demurrer: but it appears that the several matters in question were

afterwards accommodated. As to such a demurrer, vide that note to p. 504 of the rep.

Upon the cause coming on (June 7, 1755) upon the equity reserved, the Court, upon hearing read the postea, and an agreement entered into between the parties, decreed, by consent of all parties, that the plaintiff *Bennet* should forthwith pay to the defendant 600*l.*; and should also pay to her 50*l.* *per annum* for her life, to commence from Lady-day then last, and should advance to her 100*l.* on the said annuity; and assign to her a bond debt of 50*l.* due to him from her brother: and, as to all other matters, the bill was to stand dismissed, without costs on either side. *Reg. Lib.* 1754. *A. fol.* 398.

Hall v. Potter, cited p. 507, is in *Show. P.* [214] C. 76.

As to the point of confirmation of improper contracts, &c. vide in *Morse v. Royal*, 12 *Ves.* 355, *et per* Lord *Thurlow*, C. in 1 *Ves.* jun. 220.

CORNWAL *versus* WILSON, July 23, 1750.

(*Reg. Lib.* 1749. *A. fol.* 611.)

VOL. I. page 509.—Plaintiff, a factor abroad, having exceeded the price limited for a purchase of hemp; the defendant, who objected to the contract, but afterwards re-shipped, and disposed of some of it on a new risque, was ordered to account for the whole at the cost price.

NOTES AND OBSERVATIONS.

THE bill alleged, that after the arrival of the ship, the defendant unloaded the hemp as his own, and afterwards put it on board another ship and sent it to Portsmouth, where he delivered it according to his contracts with government. The defendant insisted, he disposed of it as agent to the plaintiffs, and not on his own account; and denied he delivered it at Portsmouth to make good any

contract of his own. He nevertheless admitted, that he caused part thereof to be sent to Portsmouth on board another ship, to be delivered to the Commissioners of the Navy, on a contract made with them by *R. G.* The defendant said he tried to sell the hemp in London, on the plaintiff's account, but could only sell a small part at a low price.

The Court declared, "That the defendant by the acts done by him, after the hemp in question was brought into the port of London, and by the sale and disposition thereof, and sending the same to Portsmouth on a new risque, had taken the said hemp upon himself, and [215] ought to account to the plaintiffs for the same, according to the price of 14 and a half rix-dollars, per ship's pound; being the price at which the plaintiff bought the same at Riga." It was therefore referred to the Master to take an account of all dealings and transactions between them relating thereto. *R. L.*

WILLIAMSON *versus* CODRINGTON,
July 21, 1750.

(*Reg. Lib.* 1749. *B. fol.* 577.)

VOL. I. page 511.—Voluntary provision in trust for natural children, good against the father's representative. The estate having been sold by him for a valuable consideration, the plaintiffs were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. (1) An account being directed, a deduction was made in respect of their maintenance.

As to voluntary deeds, vide *Colman v. Sarrel*, 1 Ves. jun. 50.

NOTES AND OBSERVATIONS.

(1). THE father expressed to bind himself, his "heirs, executors, administrators, and assigns."

Besides what is mentioned in the report p. 512, as to the bill, it stated, that various negroes and their issue, were

removed from this plantation to others by Sir *William*, where they were afterwards wholly used, and employed for his benefit. An account as to them was also prayed, and it was decreed accordingly, *vide post*.

(1) The answer alleged, that the plaintiff and his brother, after having been maintained in England at the expense of Sir *William* for a considerable time, returned to Antigua, from which time Sir *William* not only supported, but from time to time made a large and ample provision for them, in order to advance and settle them in the world, and expended upon them more than the value of the plantation and premises in the trust deed: and the defendant stated she was not [216] only induced to believe that such payments and advancements were intended by Sir *William* in full satisfaction, as well of the provision pretended to have been made for them by the deed, as of all other provisions which he ever proposed for them, from the repeated declarations of Sir *William* himself, in several letters and otherwise, but also, that the same was so received and accepted by the plaintiffs, and from the value of the same, and the manner in which it was from time to time made; and that Sir *William* apprehended himself at liberty to revoke the deed at all times thereafter, and to provide for them otherwise; and that he, therefore, would never have made so large a provision as he did for them if he had not intended to do so: for which reasons the defendant insisted, that in accepting the provision so made for them, they accepted it upon the terms and conditions upon which it appeared to have been made, *viz.* as the only provision they were ever to accept from him. And she further insisted, that by never claiming the benefit of the deed in Sir *William's* lifetime (though they were both of age long before he died) they acquiesced and relinquished all right and title, which (if any) they might otherwise have been entitled to.

The defendant hoped if such pretended deed should

appear to be any way defective, or void, in point of law, either for want of an attornment thereto, by the tenant, or by reason of its not being recorded in the Registrar's office, or for any other reason, she should not be prejudiced

by her ignorance of the laws and customs of St. Christopher; but should have the full benefit of all advantages arising from such defects, as fully as if she had pleaded the same, in bar to the plaintiff's setting up, or insisting upon the said pretended deed.
R. L.

The Court, after declaring that the plaintiff *William*, in his own right, and the plaintiffs *William* and *J. J.* as executors of *John*, were entitled to satisfaction for the plantation, and the negroes, &c. comprised in the deed, from the time of the death of Sir *William*, according to the directions after mentioned, directed the Master to inquire into, and settle, what was the value of the plantation in sterling money, to be sold when Mr. *G. M.* recovered the said plantation, &c.; and that the defendants, the executors of Sir *William*, should be charged in such account with such value; and the Master was to compute interest at 4l. *per cent.* from the death of Sir *William*, for the sum that should be so settled for such value; and he was likewise to take an account of such of the negroes, slaves, horses, cattle, coppers, stills, and mill, granted by the deed, as were in being at the time of the death of Sir *William*, or were sold or disposed of by him during his life-time, and for what sum the same were so sold or disposed of; and of the value of such of them as were converted to the use of Sir *William*, in his life-time: and the Master was in such account to charge the defendant with the value of such of the negroes, &c. as were in being at the death of Sir *William*, as the same stood at the time of his death; and also of such of them as were con-

[218] verted to his use in his life-time, as the same then stood; and also, with the price or value for

which any of them were sold or disposed of in his life-time. He was also to take an account of the offspring and increase of the said negroes, horses, and cattle; and whether any of such offspring and increase were in being at the time of his death, or were sold or disposed of by him in his life-time; and the defendants were to stand charged with the value of such offspring and increase as were in being at the time of Sir *William's* death, or were sold or disposed of by him in his life-time. And the defendants were to pay to the plaintiffs what should be found due upon the balance of such account. The Court reserved the consideration of interest as to the account of the negroes, and other specific things, and of the offspring and increase of the negroes and cattle, till after the Master's report.
Reg. Lib.

Vernon v. Vernon, cited p. 513, is in 1 *Bro. P. C.* 267, octavo edit.

GRIGBY *versus* COX, July 24, 1750.

(*Reg. Lib.* 1749. *A. fol.* 647.)

VOL. I. page 517.—Purchase from a wife of part of her separate estate,⁽¹⁾ without her trustees joining; with a covenant by the husband, that it was free from incumbrances. There being no proof of the husband's improper influence, although it was alleged, the purchase was effectuated; but as to the husband's covenant, the wife held not bound; and, there being an incumbrance, the plaintiff's remedy was against the husband alone.

NOTES AND OBSERVATIONS.

(1) VIDE *Allen v. Papworth*, 1 *Ves.* 163, *et antea*, (88.)

In the principal case the wife averred by her answer, that she executed the deeds by the compulsion and threats of her husband, and for fear that she should lose her life if she refused. *R. L.*

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Thayer v. Gould, mentioned at the end of the case, page 519, is in 1 *Atk.* 615, and *Reg. Lib.* 1739, *B. fol.* 152.

BARRET *versus* BECKFORD, July 24, 1750.

(*Reg. Lib.* 1749. *A. fol.* 619.)

VOL. I. page 519.—Testator being under an obligation to pay an annuity to M. P. bequeaths the residue of his estate for the benefit of his mother and M. P. for life. This is not to be considered in satisfaction of the annuity.

Limitation over “after legitimate heirs” too remote, unless capable of being confined to the period of the party’s death.(1)

NOTES AND OBSERVATIONS.

THE testator was residuary legatee as well as executor of his uncle. *R. L.*

This is not quite immaterial; Lord *Hardwicke* mentioning in his judgment, that “he owed every thing to his uncle.”

Lee v. D’Aranda, *Door v. Geary*, and *Blandy v. Widmore*, cited in the Report, pp. 519, 520, are in 1 *Ves.* 255, and 1 *P. W.* 324.

Upon the several points vide 2 *Ves.* 37, Mr. *Cox’s* note to *Blandy v. Widmore*, 1 *P. W.* 324; the note to *Lee v. D’Aranda*, *antea* (2); *Freemantle v. Bankes*, 5 *Ves.* 79; *Twisden v. Twisden*, 9 *Ves.* 413; and *Garthshore v. Chalie*, 10 *Ves.* 1.

(1) See *Flanders v. Clark*, 1 *Ves.* 9, *et antea* (12); and *Butterfield v. Butterfield*, 1 *Ves.* 133, *et antea* (81.)

[220] PIERS *versus* PIERS, July 23, 1750.

(*Reg. Lib.* 1750. *B. fol.* 97.)

VOL. I. page 521.—Father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father

received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it, as the debt of his father.

Injunction refused to restrain the father, who was without impeachment of waste, from removing a deal floor he had placed, and young oaks he had planted, breaking up meadow land, &c. To ground such an injunction, there must be waste and spoliation, and no delay in applying for it.

NOTES AND OBSERVATIONS.

THE cause came on ultimately for judgment on the 10th of the following December, when the Court dismissed the supplemental bill, but without costs; and as to the original bill, decreed, that certain lands which had been purchased by the father, and conveyed to his own use, should be settled according to the agreement, and exonerated by him from some incumbrances. In the father's answer to the supplemental bill, he said, "that the plaintiff, having declined all offers for an accommodation, and being determined to prosecute the suit, and put him to expense therein, he insisted he had a right to pay himself the expenses of such suit, out of the estate, of which, by the plaintiff's own showing, he, the defendant, was tenant for life, *sans* waste; and that he could take down several ornaments he had put up at Bradley House, and leave it in the same condition he found it; *viz.* a farm house; and that he would go as far as the law or his right would allow him, in cutting down timber and trees, and breaking up ground in the settled estate; which he had accordingly done."

Reg. Lib.

These expressions very probably induced Lord *Hardwicke* not to give him the costs of the supplemental bill.

CONYNGHAM *versus* CONYNGHAM,

July 31, 1750.

(*Reg. Lib.* 1749. *A. fol.* 635, 637.)

VOL. I. page 522.—On a rehearing. The former decree having been drawn up on defendant's default at the hearing.

Devise of "rents, profits and produce"(1) of West India estates to be consigned to trustees, and applied by them in disencumbering an estate in Scotland of debts, and also in payment of other debts, funeral expenses and legacies. Held on rehearing, that such charges could only be paid out of the annual perception of rents and profits; and that part of the former decree, which had directed a sale, was reversed.

A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust, and say he acted merely as factor or agent.

NOTES AND OBSERVATIONS.

(1) **ALTHOUGH** formerly several Judges seem to have followed each other in saying broadly that a devise or settlement of "the profits" of lands is the same as "a devise of the land," and implies any profits the land will produce by sale, &c. (*vide in Trafford v. Ashton*, 1 *P. W.* 418, 1 *Ves.* 41 and 171;) yet Lord *Hardwicke* seems to have been fully sensible they had gone too far (see 1 *Ves.* 41 :) and it appears that Mr. *Cox's* observation on *Trafford v. Ashton*, 1 *P. W.* 418, note, is not only a sound one, but has been adopted in later cases.

The note there intimates, "it seems that the natural meaning of the word 'profits' is 'annual profits;' and that the cases which have extended it further are exceptions out of the general rule, in which the context afforded a different construction."

Vide *Ivy v. Gilbert*, 2 *P. W.* 19, &c. &c.

Besides the cases mentioned by Mr. *Cox*, in confirmation of what he thus states, the author of these notes would suggest, that even the principal case of *Conyngham v. Conyngham*, taken altogether, might also be adduced for that purpose.

However that may be, later decisions have adopted Mr. Cox's position; see most of them, and the cases forming several of the exceptions in the late case [222] of *Allan v. Backhouse*, 2 Ves. & B. 65.

The author of these notes can scarcely, perhaps, furnish a stronger instance than the important case of *Bell v. Mitchelson*, determined by Lord Eldon, C. on the 17th December, 1811, when his Lordship, affirming the decree of Sir W. Grant, M. R. seems to have settled the point accordingly; besides manifesting another serious and well-founded distinction, elicited by the argument; viz. that although a grant or devise of "rents and profits," without more expressed, or to be inferred, will not pass real estates of inheritance, or a term thereon attendant, &c. (inasmuch as what is not expressly given out of an estate of inheritance remains with the owner of it, or his heir;) it may yet pass the whole interest in a term in gross whether for years or for lives, agreeably to the reasoning in *Goffe v. Hayward*, 1 Rolle's Rep. 247 and 368. [See a short report of that case at the end of the principal case.]

The principal case of *Conyngham v. Conyngham*, seems to require some exposition rather at length.

The plaintiff was the widow of *Robert Cunningham*, and was entitled to an estate for life in certain lands, &c. in Scotland; and also to an annuity of 200*l. per annum* under his will and the deed of gift next mentioned.

The original bill first stated a deed of disposition revocable, executed in Scotland, whereby the testator (*inter alia*) "obliged himself, his heirs and successors, who should inherit his estate or plantation of Cayon, in the island of St. Christopher, to clear his [223] above-mentioned lands, &c. in Scotland, of all debts, and to warrant his assignation thereof, &c."

By his will, dated October 27, 1743, the testator, after directing that his lands and houses at Bassaterre Town, in the said island of St. Christopher, should be affixed

and annexed to his said plantation at Cayon, "charged"* his said plantation and lands, &c. to *Daniel Cunningham* and others, and the defendants *Coleman*, and their heirs, in trust, for payment of his funeral expenses, debts, and legacies; and to keep the said plantation in good repair, and to keep the negroes, with their increase, and the stock thereon, in as good condition as they were in at his death, "out of the rents and profits" of his said plantation, &c.

He then declared a further trust for the benefit of his son *Daniel*, whom he empowered to charge the said premises with a sum equal to double what he should receive for his wife's fortune, and gave the remainder of said estates to *Daniel* and the heirs male or female of his body.

In default of such issue, the remainder to the testator's daughter, *Mary R.* and others, to have the profits of the said plantation and premises during their lives, as tenants in common; "the same to be kept in good repair, with the stock, &c. thereon;" and with divers remainders over.

The testator then directed, "that the produce" of his plantation at Cayon (after defraying its charges)
 [224] should be from time to time shipped as *Coleman*, his heirs or assigns, should direct, "and be consigned to him and them, until his, the testator's, funeral charges, debts, and legacies should be paid: and he gave him and them power, 'out of the said produce, as the same should be remitted,'" to pay his debts and legacies in Great Britain, with interest, agreeably to his said will, and without any order from his executor (who was the said *Daniel C.*) or any other person who should afterwards come to inherit the said plantation and lands.

"And the better to secure such consignments, he directed all who should inherit his said plantation, &c. to

* This word "charged" seems used in the sense "committed," "entrusted."

send an account every year to his, the said testator's, said trustees, of the whole produce thereof, and how it was applied; in which, if there should be any neglect or misapplication, his said trustees might appoint an overseer or manager upon the said plantation."

The bill stated (among other things) the plaintiff's hopes, that the defendants would have cleared the estate, &c. in Scotland, which was left to her, of all the testator's debts, &c. out of the said testator's plantations and lands, agreeably to the said deed of disposition and his will; but that on the contrary the defendants had encouraged the testator's creditors to claim and enforce their demands out of the said Scotch estates, and had otherwise much distressed the plaintiff, and put her to the expense of suits, &c.

The bill therefore prayed, "that the defendants would set forth whether they would accept or refuse the trust, and also an account of the trust estate, and the produce thereof, &c. &c.: and that they might [225] be compelled 'out of the rents and produce, and, if necessary, by mortgage or sale of the said plantation estate,' to disencumber and clear the said lands, &c. in Scotland;" and to satisfy the plaintiff all arrears and growing payments of her annuity: and in the mean time, that an overseer or manager might be appointed, if necessary, &c. &c. The defendants did not appear at the original hearing, though duly served; so that the decree was taken by default. The original hearing was on the thirteenth April, 1749. That part of the decree material to the points in question in the report, was drawn up so as to direct a sale of the plantation estate, &c. to make good any deficiency there might be with respect to the debts, legacies, &c. in the rents, profits, and produce to be accounted for.

The cause, therefore, came on before Lord *Hardwicke*, as stated in the report, by way of re-hearing, on this

point more especially, as well as on the other objection there noticed. Lord *Hardwicke*, C. ordered, that the decree should be varied, and be (in effect) as follows:—

It was declared, that the will should be established, and the trusts thereof performed, which was decreed accordingly. An account was then directed as to the arrear of plaintiff's annuity; also as to the testator's debts and incumbrances affecting his Scotch estate, &c. and of all other his debts, funeral expenses, and legacies, &c.

Plaintiff, the widow, was to stand in the place of such creditors who had received, or should receive, their debts out of the Scotch estates.

[226] An account was decreed from *Daniel C. and W. Coleman*, of the rents, profits, and produce of the plantation in Saint Christopher, called Cayon plantation, and of the lands and houses in Bassaterre Town affixed or annexed thereto by the will; and out of what should be coming on that account, the several debts and incumbrances of the testator affecting his Scotch estate, &c. were to be paid and satisfied. Plaintiff, the widow, to be paid thereout such debts as had been paid, or should be paid, out of the Scotch estate; and also such costs and damages as she had been put to, or sustained, or should sustain, by any action or suits brought by the creditors relating thereto, to be settled by the Master, and also the arrears of her annuity; the defendants to pay accordingly.

And out of the rents, profits, and produce of the said plantation estate, the plaintiff was to be paid her annuity in future. The testator's creditors, annuitants, and legatees to come in and prove their debts, &c.

After satisfaction of the testator's debts and funeral expenses, arrears of the annuities, &c. the residue of the rents, profits, and produce to be applied in payment of the legacies, *pari passu*.

That the defendant *Coleman* should make his election, whether he would continue to act in the trust under the

will, and postpone the payment of his own incumbrance on the Cayon Plantation, pursuant to the will.

If he should elect so to do, then defendant *Cunningham* was to consign the produce of the plantation estate to him, to be applied according to the will and that decree.

If he should elect not to do so, then the Mas- [227] ter was to appoint a proper person in London, as consignee, the produce to be applied according to the will and that decree.

And as to any sums paid by *Coleman* to *Cunningham*, out of the profits and produce, &c. which should not be allowed him by the Master, by way of just allowances in the said account, the defendant *Cunningham* was to indemnify him in respect thereof, &c. &c. *R. L.*

L. BELT, Esq. v. T. MITCHELSON & R. BELT, Esq.

Rolls, March 15, 1809.

Affirmed on Appeal by Lord *Eldon* C. Dec. 17, 1811.

Grant or devise of "rents and profits," referable to a term in gross, or mere chattel interest, will pass the whole interest in the term. Contra as to a term carved out of an inheritance.

THE case of *Belt v. Mitchelson and Belt*, was, in substance, this: "Shortly after the marriage of Mrs. *B.* (the mother of the material parties,) a settlement was made of her husband's, and of her real estates, under which (*inter alia*) a term of 1000 years was created out of her estates, and vested in trustees, who were directed "out of the rents and profits of the said premises so limited to them as aforesaid, and as they should, from time to time, as the same became due, receive them, raise, levy, and pay unto the eldest son of the marriage, during so many years of the said term as he and his mother should happen jointly to live, not exceeding one third part of the clear rents and

profits of the aforesaid premises so limited to them, or so much of the rents and profits of the said premises, not exceeding one third part thereof, as the father should appoint, during such joint lives of such eldest son and his mother. And upon further trust, that in case there should be, besides an eldest son, a younger child or children, issue of the said *R. B.* and *Eliz.* his wife, that then the trustees should pay all the residue of the rents and profits annually arising from the said premises, as they should receive the same, unto such younger child, or younger children, equally and proportionably, during the joint lives of the mother and eldest son."

Then followed the material clause on which the question arose, and which was as follows: "And also upon this farther trust, that in case such eldest son, for the time being, shall happen to die in the life-time of his said mother, or his said mother shall happen to die in the life-time of such eldest son, then, upon trust, that they, the said trustees, or the survivor of them, or the executors, administrators, or assigns, of such survivor, shall and do pay the whole of the rents and profits arising from the said premises so limited to them, to such younger child, if only one, or to and amongst such younger children, if more than one, equally and proportionably."

The father died; the mother survived him many years, and enjoyed the possession of the paternal estates, according to the settlement, as her jointure.

There were but two surviving children of the marriage, and the question arose merely as to the estates *ex parte materna*.

[229] During the mother's life-time, the rents and profits of the maternal estates were received by the eldest son, and youngest son, in the unequal proportions above described.

On the death of the mother, the eldest son succeeding at length to the enjoyment of his paternal estates, the

whole of the rents and profits of the maternal estates were duly received by the younger son, according to the trusts of the term; the inheritance subject to that term, being vested in the eldest son, as the heir and devisee of his mother.

The younger son, conceiving himself entitled, under this settlement, to the whole interest in this term of 1000 years, was preparing to dispose of some of the estates included in it; which being prevented by his brother, the suit was instituted by the younger son against the eldest and *Mitchelson*, a nominal defendant, who had taken out administration *de bonis non*, to the surviving trustee of the term.

The estates were of great value, and the case was argued at much length; first at the Rolls, by Mr. (now Mr. Baron) *Richards*, Sir *Samuel Romilly*, and Mr. *Shadwell*, on the part of the plaintiff, and Sir *Arthur Piggott*, Mr. *Leach*, and Mr. *Bell*, for the defendant.

Sir *William Grant*, Master of the Rolls, dismissed the bill on the 15th March, 1809; holding clearly that the younger child was only entitled to receive the rents and profits during so many years of the term as he might happen to live; and that the eldest son, representing his mother, as the owner of the inheritance, and having therefore all such rights and interests in [230] the estates in question, as had not been expressly given away from the inheritance, the term was to be attendant thereon, for his benefit.

The plaintiff appealed from this decree; and the case was solemnly argued before Lord *Eldon*, C. for several successive days, by the same counsel, with the addition also of Mr. *Sugden*, for the plaintiff and appellant.

On behalf of the appellant it was (*inter alia*) contended, according to the old doctrine, that a gift of "rents and profits," was "a gift of the land; profits of lands implying (as was urged) any profits that the "lands would

yield," agreeably to what was stated in the text of *Trafford v. Ashton*, 1 *P. W.* 418, &c. &c. In addition to this, Sir Samuel Romilly cited the case of *Goffe v. Hayward*, 1 *Rolle Rep.* 247 and 368; upon which he much relied.

On behalf of the defendant and respondent, the deduction from the cases by Mr. Cox, in his note on the very case cited of *Trafford v. Ashton*, 1 *P. W.* 418, was relied upon, fortified by the authorities there adduced.

Particular stress was laid on the observations made by Lord Eldon, C. in *Maundrell v. Maundrell*, 10 *Ves.* 270; of Lord Macclesfield, C. in *Mills v. Banks*, 3 *P. W.* 7; in *Ivy v. Gilbert*, 2 *P. W.* 19: and of those also of Lord Hardwicke, C. in *Ambler* 95.

The argument also noticed the distinction made between a rent charge out of real estates, and an annuity,

&c. out of a mere term or chattel interest, as exemplified in *Ambler* 139, 1 *Rolle Ab.* 831. *Tt. Estate*, and 2 *Vern.* 35. And further, that as

to the case cited of *Goffe v. Hayward*, 1 *Rolle Rep.* 247 and 368, it was unnecessary to dispute its positions (though it might be observed it does not appear to have been determined,) because that was the case of a term in gross, a mere chattel interest, which differed entirely, and proved nothing towards the case before the Court.

Lord Eldon, C. on the 11th December, 1811, affirmed the decree of the Master of the Rolls, on full consideration during the continued argument of several days; observing, that although the settlement before him was in numerous instances (unnecessary to be mentioned here) so very strange and singular, that it was unlikely the Court would ever have to deal with such another; yet still

The case was a very important one, upon the doctrine of the above points.

His Lordship said he fully agreed with the argument of the counsel for the defendant, and the positions they had

adduced from the cases as above referred to, which he had always considered as clear law.

He certainly did hold it clear, that as to real estate, whatever the owner of the inheritance had not manifestly departed with still remained with him or his heir, whether it were the estate itself, or a term which had been carved out of it.

His Lordship allowed, that as to a term in gross, it might be otherwise; and the doctrine in *Goffe v. Hayward*, which had been cited, seemed to support it. The nature of terms in gross, however, being mere chattel interests, was altogether different from the nature of terms, which had been carved out of an inheritance to answer particular purposes. [232]

In such instances, the Courts of Equity viewed the term as created for the particular purposes, and for no other; considering the term as attendant on the inheritance, as to every thing beyond them.

All such portions of the inheritance, and trusts relative to an inheritance, as are not manifestly given away, or held to be so from the very nature and necessity of the thing, remain still the property of its owner, or of his heir. The consequence of which was, that every term created out of an inheritance is considered in Equity as attendant on it, when the precise purposes for which it was created have been answered; in the same manner as if it had been so expressly declared.

Applying that rule to the case before the Court, his Lordship saw no trust beyond the payment of the whole of the rents and profits (receivable as they were, by the terms of the instrument, annually) to the younger children, or younger child, for so many years of the term as he or they should live. That word "whole" being used in the settlement, in contradistinction to the fraction of two-thirds, which such younger children or child would have been receiving during the joint lives of the elder brother and their mother.

His Lordship, therefore, on the clearest grounds, affirmed his Honour's decree, and dismissed the bill.

This decree was afterwards signed and enrolled without further appeal.

[233] **GARTH *versus* COTTON,**
July and August 10, 1750, and Feb. 1753.
(Reg. Lib. 1752. A. fol. 240.)

VOL. I. page 524.—S. C. 3 Atk. 751. 1 Dick. 183. Et vide 1 Ves. 546.

Waste.—Timber.—Tenant for life.—Tenant for years, &c. without impeachment of waste.—Tenant in tail and reversioner.—Rights, powers, and duties of trustees to preserve contingent remainders. Tenant for 99 years, if he should so long live, “without impeachment of waste, except voluntary waste,” with remainder to trustees to preserve, &c. then to his first son in tail, with the reversion to A. in fee. The tenant for life having no son for a long while, sells timber, and divides the profits with A. the reversioner, by agreement between themselves. The former has afterwards a son. That son as owner of the inheritance, entitled to recover what A. so received.(1)

NOTES AND OBSERVATIONS.

(1) **SEE** the report continued by the Lord Chancellor's judgment, 1 *Ves.* 546.

It appears from *R. L.* that the decree was not actually made till Feb. 1753.

The Court declared, that “on all the circumstances of the case, the plaintiff is entitled to recover satisfaction in this Court for so much value of his inheritance as the defendant's testator exhausted and received, by virtue or colour of the articles entered into between him and the plaintiff's late father, who was tenant only for the term of 99 years, if he should so long live:” and ordered “that the Master should compute interest on the sum of 1000*l.* admitted by the answer of Sir *J. H. C.* deceased, to have been received by him, from the time of filing the plaintiff's

bill, after the rate of 4*l.* *per cent. per annum*, and tax the plaintiff his costs; and that what should be so found due to the plaintiff for the 1000*l.* interest and costs, should be considered as a demand by simple contract on the estate of Sir *J. H. C.* deceased, and be answered and paid to the plaintiff by the defendants, the executors, they having admitted assets of their testator Sir *J. H. C.* by their answer to the bill of revivor." *Reg. Lib.*

The author of these notes has subjoined the [234] decree, although it is reported in 3 *Atk.* 758; since he thinks that each report of so important a case ought to be complete in itself.

As to the points in question, see *Williams v. Duke of Bolton*, cited 3 *P. W.* 268, note. *Aston v. Aston*, 1 *Ves.* 264, 396, and the note on it referable to p. 399, *antea* (175). Et vide *Stansfield v. Habergham*, 10 *Ves.* 272, 278-9, &c.

Abrahall v. Bubb, cit. p. 255, as from *Sho.* 69, is also in 2 *Freem.* 55.

Litton v. Robinson, cit. p. 526, is in 3 *Atk.* 209, and 8 *Vin. Ab.* 475. As to that case, see Mr. *Sanders's* edition, 1 *Atk.* 209, which notices a difference between the report there and the one in *Viner*. See also as to *Litton v. Robinson*, in *Stansfield v. Habergham*, 10 *Ves.* 276, 282.

Jesus Coll. v. Bloom, cit. p. 528, is in 3 *Atk.* 262.

As to the question asked by Lord *Hardwicke*, page 528, with reference to what the Court would do with the produce of the timber improperly cut, see *Bewick v. Whitfield*, 2 *P. W.* 241, and *S. C.* 3 *P. W.* 267, 268; and especially Mr. *Cox's* note to the fifth edition, 3 vol. p. 268; also *Williams v. Duke of Bolton*, cited 3 *P. W.* 268, note. *Harg. Co. Litt.* 218, *b.* note (2); and *Aston v. Aston*, 1 *Ves.* 399, with the note thereon, *antea.* (175).

Mansel v. Mansel, cit. p. 529, is in 2 *P. W.* 678. *Partridge v. Pawlet*, cit. *ibid.* is in 1 *Atk.* 467.

With regard to what is said (p. 529) about *Whitfield*

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v. *Bewick*, 2 *P. W.* 240, and 3 *P. W.* 267, being "a little defectively reported," see Mr. *Cox's* note to the fifth edition, 3d vol. 268.

It appears from thence—that there were trustees to preserve contingent remainders. That the bill was not brought by the remainder-men, together with the infant tenant in tail, as there stated; but by the tenant for life, and his son the infant; and that it was brought merely for the infant's benefit, its object being to have the produce of the timber secured for the infant.

Pye v. Gorge, cit. p. 546, is in 1 *P. W.* 128.

Mansel v. Mansel, cit. *ibid.* is in 2 *P. W.* 678.

As to which doctrines, see also 10 *Ves.* 278-9.

As to subsequent cases of injunctions relative to trees for ornament or shelter, as noticed at p. 547, see *Chamberlayne v. Dummer*, 1 *Bro.* 166, and 3 *Bro.* 549. *Marq. Downshire v. Lady Sandys*, 6 *Ves.* 107; and *Williams v. Macnamara*, 8 *Ves.* 70, 71.

Darrel v. Champness, cit. p. 548, is in *Eq. Ca. Ab.* 400. *Savile v. Savile*, cit. *ibid.* is in 2 *Atk.* 458, 464.

Littone v. Robinson, cit. *ibid.* is in 3 *Atk.* 209. As to which see Mr. *Sanders's* edition.

PARKER *versus* PHILIPS, August 1, 1750.

(*Reg. Lib.* 1749. *B. fol.* 433.)

VOL. I. page 530.—Rolls.

NOTES AND OBSERVATIONS.

THE bill was dismissed, but not with costs. *R. L.*

ATTORNEY GENERAL *versus* WHORWOOD,
August 2, 1750; and
 WHORWOOD *versus* UNIVERSITY COLL.
 OXFORD.

(*Reg. Lib.* 1749. *A. fol.* 652.—*Reg. Lib.* 1755. *A. fol.* 607, 609.)

VOL. I. page 534.—Devise to a College not for academical or collegiate purposes, but merely to make testator's house unalienable, and that one of the Fellows should live in it for ever. Lord *Hardwicke* first thought it questionable whether this is a charity under the 43d of Eliz., and whether a good devise under the Mortmain act; and it was afterwards determined to be void.(1)

Right of the Crown to direct the uses of an improper charity.(2)
 Baron and Feme. Husband receiving proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out, pursuant to trusts relative to other property; this note held evidence of the agreement antecedent to the sale, and estates purchased afterwards by the husband, were held to be bound.

Pleading.—Interrogating part of a bill must be supported by a substantive charge.(3)

Exceptions. Voluntary deeds good against representatives, if they amount to a complete conveyance or transfer.

NOTES AND OBSERVATIONS.

(1) THE codicil directed, that "the College should never sell, change, or otherwise alienate, the donation of the manor of Denton, or any parts of the lands and tenements thereto belonging, from the purposes intended; which were, that if there should be a Senior Fellow," &c. &c. (as in the report.)

One of the purposes was, "to give entertainment to the poor and needy from the adjacent parts."

The bequest was afterwards declared void by Lord *Northington*, C. Vide *postea*, at the end of the last note in the case.

(2) Vide *Moggridge v. Thackwell*, 7 *Ves.* 36, and the cases therein referred to, especially pp. 77, 78; *Corbyn v.*

French, 4 *Ves.* 418; and *Morice v. Bishop of Durham*, 9 *Ves.* 399. Affirmed on appeal by Lord *Eldon*, C. 10 *Ves.* 522; and *Cary v. Abbot*, 7 *Ves.* 490.

It seems settled by the above cases, that where the purpose of an intended charitable gift is either contrary to law, or too general and indefinite, the disposition [237] is in the King, by sign manual. The contrary position, therefore, contended in the argument towards the bottom of p. 536, is not correct.

The Attorney General v. Baxter, cited page 537, is thus mentioned in Lord *Hardwicke's* notes:

“The decree was reversed, not upon any thing contradicting the general principle, reported to be stated; but because [it was] really a legacy to sixty particular ejected ministers, to be named by *Baxter*, and [the same] as a legacy to those sixty individuals.” Vide per Lord *Eldon*, C. 7 *Ves.* 76.

(3) Vide page 538. See also *Mitford* 46, and 6 *Ves.* 62.

But where a plaintiff does make a substantial charge, even in a general manner, he may interrogate as to all the circumstances. Vide *Mitf.* 45; 11 *Ves.* 296, 301, 302, 376.

As to the cases mentioned p. 539, of voluntary deeds being supported against representatives, where they amount to a complete conveyance or transfer of the property, vide *Peck v. Parrot*, 1 *Ves.* 236, and the notes thereon, *antea* (128.)

Smith v. Deacon, cit. p. 540, is in 3 *Atk.* 323. Vide Mr. *Sanders's* note, *ibid.* Et vide *Lewis v. Hill*, 1 *Ves.* 274.

In the principal case the Court declared, “that *Ann Whorwood*, the plaintiff in the cross cause, was entitled, by virtue of her marriage articles, to have the sum of 4000*l.* therein mentioned, and also the money arising by the sale of her interest in her father's real estate, laid out

in the purchase of lands and tenements, to the uses of, and pursuant to, the said articles, and [238] that by virtue of the agreement of her late husband, contained in the paper writing, dated, &c. she was entitled to have the money arising by the sale of her sister *Dorothy's* share in her father's real estate, laid out in the purchase of lands and tenements, to the like uses." "And it appearing, that the whole money raised by sale of the said plaintiff and her sister *D's* shares of her father's real estate, amounted to the sum of 7000*l*." the Master was directed to inquire what purchases of freehold lands of inheritance were made by *T. W.* after his marriage; and whether such lands were proper to be settled, pursuant to the articles: and if the Master should find that they were, &c. then he was to inquire how much the purchase money thereof amounted to; and the same was to be accepted and settled in lieu and satisfaction of so much of the said two sums of 4000*l*. and 7000*l*.; and the residue of such two sums was to be considered as a debt on *T. W.'s* estate, and to be laid out in the purchase of lands and tenements, with the approbation of the Master, pursuant to the articles: and the same was to be settled, with the like approbation, to the use of the plaintiff *A. W.* for her life, in part of her jointure, with remainder to the defendant *C. S.* for her life, with remainder in fee to the use of the two senior six clerks, not towards the cause, in trust, and for the benefit of such person and persons as should appear entitled thereto; and to and upon such trusts, &c. as the same ought to be limited, and subject to the directions of the Court; and, in the mean time, the money, before directed to be laid out in a purchase, was to be placed out at interest on government or real securities, &c. [239] in the name of a trustee or trustees, to be approved of by the Master; and the dividends and interest thereof were to be paid to such persons as would be entitled to the rents and profits of the lands when purchased.

But if the Master should find that the purchased lands were not proper to be settled pursuant to the articles, then the said two sums, making together 11,000*l.* were to be considered as a debt on *T. W.*'s estate, and to be laid out pursuant to the articles, &c. as above mentioned. And it was ordered, that the manor of Denton, with the lands and premises agreed to be settled by the marriage articles, with the appurtenances, should be settled, with the Master's approbation, to the like uses, and to and upon the like trusts, &c. And the plaintiff *A. W.* was declared to be entitled to interest, at the rate of 4*l. per cent.* for so much money as ought to have been laid out in the purchase of lands, as aforesaid, from the death of her husband.

It was ordered, that the testator's house and gardens at Denton, with the appurtenances, and any parcels of land proper to be let therewith; together with the household goods and furniture in the house, should be let to a tenant, with the approbation of the Master, &c. &c. And the Master was to distinguish and apportion how much of the rent ought to be paid for the house, gardens, and lands, with the appurtenances; and how much for the household goods and furniture: and so much of the rent as should be allotted to be paid for the house, gardens, and land, was to be paid to the plaintiff *A. W.*: and so much of [240] such rent as should be allotted to be paid for the household goods and furniture, should be paid to the defendant *C. S.*: and an inventory was directed to be made of such household goods, &c. and signed by the said plaintiff and defendant, and left with the Master for the benefit of all parties interested therein.

The copyhold lands not surrendered were declared to have descended to the testator's heir at law, and possession thereof was directed to be delivered to him, &c.

The Master was to inquire, whether the regulations indorsed on the testator's will, were consistent with the statutes of the College, or not; and also whether the Col-

lege had power, at the time of the devise, to take, in mortmain, the lands and tenements thereby devised to them in remainder; and the Master was to state the same, and all circumstances relating thereto, with his opinion thereon, to the Court, &c. *Reg. Lib.*

It appears that exceptions having been taken to the Master's report, on account of his having certified, that the regulations indorsed on the testator's will were consistent with the constitutions of the College, those exceptions were allowed on the 13th June, 1775. *Vide Reg. Lib. 1755. A. fol. 609.*

The above causes, together with some others on behalf of charities, under this will, coming on before Lord *Northington*, C. upon the 26th June, 1756, the Court declared, that the regulations indorsed on the codicil were inconsistent with the constitutions of the College; and, consequently, that the trust, whereupon the testator's real estate, and the surplus of his personal [241] estate, were devised and given to the respective Colleges, being void, the devise of the real estate was a resulting trust for the testator's heir at law; and that for the same reasons the bequest of the surplus of the personal estate to the executors, was also void, so far as it related to any interest or benefit thereby given to the Colleges in succession, &c. &c. &c. *Reg. Lib. 1755. A. fol. 607, 609.* See moreover 7 *Ves.* 496.

PRAT *versus* CHAPMAN, August 3, 1750.

(*Reg. Lib. 1749. B. fol. 552.*)

VOL. I. page 542.—Rolls.—Bequest of residue between two; one of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of. (1)

NOTES AND OBSERVATIONS.

Owen v. Owen, there cited, is in 1 *Atk.* 494.

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(1) See 2 *Ves.* 285; and *Bennet v. Batchelor*, 1 *Ves.* jun. 63.

OATES *versus* CHAPMAN, *August 6, 1750.*

VOL. I. page 542.—S. C. 1 Dick. 149. Et vide 2 *Ves.* 100.
On reversing an order for allowing a demurrer, the costs are to be refunded.

NOTES AND OBSERVATIONS.

THE order was made on consideration four months afterwards. Vide 2 *Ves.* 100.

[242] RYDER *versus* BENTHAM, *August 7, 1750.*

(*Reg. Lib.* 1749. *B. fol.* 532.)

VOL. I. page 543.—Injunction against stopping lights until trial of the right; which was directed on the motion. (1) Court will never on motion make an adverse order to pull down what has been done.

NOTES AND OBSERVATIONS.

(1) SEE *Attorney General v. Bentham*, 1 *Dick.* 277, in 1755, *S. P.* and semb. the same defendant.

Vide *Gray's Inn Society v. Doughty*, 2 *Ves.* 453. *Fishmonger's Company v. East India Company*, 1 *Dick.* 163, and *Attorney General v. Nichol*, 16 *Ves.* 338.

It appears from the cases that the Court will not interfere in many instances in which an action for damages might be maintained.

The interposition of a Court of Equity in such instances is on the principle of preventing material injury amounting to nuisance; and is by no means ancillary to the mere recovery of damages.

See more especially in *Attorney General v. Nichol*, *ubi supra*.

GAGE *versus* LORD STAFFORD and FURNESS,

August 7, 1750.

(Reg. Lib. 1749. A. fol. 516.)

VOL. I. page 544.—As to reference to the Master to ascertain whether two suits are for the same matter or otherwise.

LORD TOWNSHEND *versus* WINDHAM, [243]

July 13, 1750.

(Reg. Lib. 1749. B. fol. 612.)

VOL. II. page 1.—Distinction between powers and absolute interests.⁽¹⁾

A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors.⁽²⁾ As to these assets, however, as between the creditors, it was held, that a creditor by judgment entered into for securing a portion given by the debtor on the marriage of his daughter was entitled to a preference.

Tenant for life assigns rents and dividends for 21 years in trust to pay a debt by instalments, the remainder to be paid to himself; but if he died before payment of all due, then such rents, &c. as were due at that time, or should be due at his death, should be applied in satisfaction of the residue—Held a specific lien on all the arrears for that debt: and that they were no assets until full satisfaction of it.

Wife not entitled to paraphernalia when husband dies indebted. The Court will, however, let her in on other funds if any.

A wife can only claim as a creditor, one year's arrears of her separate estate; as in the case of pin-money.

Mere power unexecuted in a tenant for life, who becomes a bankrupt, does not vest in his assignees.

Voluntary conveyance by a person indebted at the time, void against subsequent purchasers for valuable consideration, and creditors. If the party is not indebted at the time, and no fraud, it is good against creditors, though not against purchasers; by force of the statute 27 Eliz. c. 4.⁽¹⁾

Difference between the statutes 13 Eliz. c. 5, and the 27 Eliz. c. 4.⁽²⁾

NOTES AND OBSERVATIONS.

(1) VIDE *Holmes v. Coghill*, 7 *Ves.* 499, and 12 *Ves.* 206, with the cases cited. See also 17 *Ves.* 388.

The indenture mentioned p. 1, recited (*inter alia*) that it was made in performance of several promises and agreements "between the parties to that instrument before the marriage of *William W.* with the Countess of *Deloraine*, in order that the same might the sooner take effect."

The deed in favour of *Catherine*, purported to be "in consideration of the natural love and affection her father had for her, and by virtue of the said power reserved to him," &c.

(2) Vide *George v. Milbanke*, 9 *Ves.* 190, and *Holmes v. Coghill*, 7 *Ves.* 499, and 12 *Ves.* 206.

As to the case of *Shirley v. Lord Ferrers*, mentioned p. 2, see the latter part of the note 7 *Ves.* 503.

Bainton v. Ward, cit. p. 2, and also reported 2 *Atk.* 272, is stated more correctly in 2 *Vesey*; but that is not quite accurate. It is stated from *Reg. Lib.* 7 *Ves.* 503; from whence it appears that *G. W.* having power to charge the premises with any sum not exceeding 2000*l.* by his will taking notice of the deed and power, devised to his mother 500*l.*; to the defendants 1000*l.*; and [244] the remaining 500*l.* to his wife, whom he made sole executrix: and he charged the premises with the said 2000*l.* legacies. The bill was filed by creditors; and the decree declared "that the sum of 2000*l.* with the interest thereof, which the said *G. W.* had power to appoint by virtue, &c. and of which he made an appointment by his will, is to be considered as part of his personal estate, liable to the satisfaction of the residue of his debts." It appears from *Holmes v. Coghill*, 7 *Ves.* 499, (affirmed on appeal, 12 *Ves.* 206,) and from the cases therein cited and referred to, that the Court has always maintained the obvious distinctions between a power and absolute property, so as not to interpose against a non-execution of the

former; and that the dictum in *Bainton v. Ward*, 2 *Atk.* 172, is therefore wrong, by being laid down without limitation, and as it is attended with a misstatement of the case itself; although the same dictum is consistent, if applied to the particular case before the Court, and as confined to cases in which the party has executed or attempted to execute the extent of his power, see 7 *Ves.* 507, and 12 *Ves.* 215. It appears therefore upon the whole, that although a Court of Equity will aid a defective execution of a power, it will not supply the want of execution, even in favour of creditors; and that Lord *Hardwicke* could never have used the dictum above alluded to in the latitude reported: and that the more especially, since his Lordship lays it down expressly in the principal case of *Lord Twynshend v. Windham*, that no person could be entitled without an appointment, vide pp. 8 and 9.

The instance mentioned p. 3, of a tenant for [245] life, with a power to charge, becoming bankrupt, and that the same being a mere power unexecuted would not vest in his assignees, was also decided by Lord *Eldon*, C. in *Thorpe v. Goodall*, 17 *Ves.* 388, and 1 *Rose's Cases in Bankruptcy*, 40.

The assignment to *Comyns* mentioned at the top of page 4, was of "certain estates to him, his heirs, and assigns, during the testator's life, and of certain dividends to *Comyns*, his executors, &c. for 21 years, if the testator should so long live." The deed also purported to pass, for a like interest, several shares in the New River Water-works.

The trust was to apply the residue of the dividends, &c. that were due at the time of making the assignment, "and that should be due and unreceived at the time of his death, towards satisfaction of the residue of the debt. And in case the arrears should exceed what should be due to *Pratt*, at the decease of the testator, that then the residue thereof, after paying the same, should be applied for the

only use of the testator's executors and administrators." *R. L.*

The bill insisted (*inter alia*) that inasmuch as the assignment was made subsequent to a decree obtained in another suit by the plaintiffs against the testator [whereby he was excluded from any interest in the New River shares, and ordered to come to an account in respect of them,] *Pratt's* security could not stand in the way of their demands, which, by virtue of the decree, were a prior lien and demand on the said rents, dividends, and premises, [246] to any right which could be derived under the deed, &c.; and that the deed was obtained with full notice of the plaintiff's demands. But, if the plaintiff had not a priority of demand, and if the deed was not fraudulent against them, yet, that the only rents and profits included therein, which did or could pass thereby, were such as should accrue from Lady-day next ensuing the date of the deed, and that there was not the least tendency in the deed to assigning or making any arrears of rent precedent to the execution thereof, or which should accrue before Lady-day 1746, a security for *Pratt's* benefit. That as the testator, had he received the whole arrears to Lady-day, in his life-time, and after the execution of the pretended deed, could not have been made accountable for the same; neither could his executors then, be made answerable for them in any other manner than he would himself have been if living: and that as the pretended deed imported to be no more than a security for 1500*l.* *per annum*, so the rents which accrued from Lady-day to the time of the testator's death ought to be distributed in the same proportion; and the surplus thereof, at least after answering so much of the annuity as became due in the interval of time aforesaid, to be accounted for to the testator's estate, in the same manner as it would have been to himself had he lived to receive the same.

The defendant *Pratt* stated (*inter alia*) that the said de-

cree for an account obtained by the plaintiff was no lien on the arrears of rent, dividends, and profits of the premises, and that the indenture was executed before such account was liquidated by any report or agreement.

His Lordship declared "that the said defendant *J. Pratt*, and the defendant *S. Comyn*, as his trustee, are entitled to have the arrears of rent of the estate, and the arrears of the dividends of the New South Sea annuities incurred and due at the time of the death of the said testator, comprised in the said indenture, over and above the 1500*l. per annum*, specially provided by the said indenture, applied towards satisfaction of the demands of the said defendant *J. Pratt*, and that the same ought not to be considered as part of the general assets of the said testator." *R. L.*

As to the instances stated at bottom of page 9; see *George v. Milbanke*, 9 *Ves.* 190, and *Holmes v. Coghill*, 7 *Ves.* 499, and 12 *Ves.* 206.

(1) Vide pages 10 and 11, and *Stephens v. Olive*, 2 *Bro.* 90, &c. *Cowper*, 710, 711, 1 *Atk.* 15, 94. *Baumont v. Thorpe*, 1 *Ves.* 27. *Lush v. Wilkinson*, 5 *Ves.* 384, &c. (as to which see *per* Sir *William Grant*, M. R. 12 *Ves.* 155.) *Brown and Carter*, 5 *Ves.* 862. *Kidney v. Coussmaker*, 12 *Ves.* 136, and the cases there cited; especially *Montague* and *Lord Sandwich*, with the note on it there, p. 156.

(2) The 13*th Elizabeth* was made in favour of creditors. The 27*th Elizabeth* in favour of purchasers. See moreover, 1 *Ves.* 27, and 2 *Ves.* 18.

BOUGHTON *versus* BOUGHTON, [248]
July 18, 1750.

(*Reg Lib.* 1749. *A. fol.* 599.)

VOL. II. page 12.—Election—Will purporting to give a real estate to A. but not executed agreeably to the statute, giving

(*inter alia*) a contingent legacy to an infant (who became the testator's heir at law,) and expressly directing, that if any who received benefit by the will should dispute any part of it, they should forfeit all claim under it. Held, that the infant heir should elect when he came of age.(1) In the mean while A. the intended devisee, was allowed to be in possession of the estate(2) though restrained from committing waste, and subject to account; as to which, his share of the personal estate was declared liable to make satisfaction.

NOTES AND OBSERVATIONS.

AFTER the bequest to the residuary legatees, stated in the report as the end of the will, these words appear in *Reg. Lib.* "liable only to orphanage. His will being, that the contestor not content with the whole will should account for all monies which the testator had advanced him or her."

(1) Vide *Sheddon v. Goodrich*, 8 *Ves.* 481, 496, and the note to *Allen v. Poulton*, *antea* ().

(2) The Author of these notes almost ventures to doubt the propriety of this. The only ground on which it could be rightly done, would be the greater benefit to the infant in the mean while; and this, of course, must be presumed from so great, so impartial, and careful a Judge. It is, however, certain, that the legacy was contingent; and that the report does not at all notice such greater benefit to the infant in the mean while. The implication from thence would be rather to the contrary; the Lord Chancellor being stated to observe, "that the Master could not judge for the infant on account of the legacy being in several contingencies;" and to say only "that the plaintiff 'must' receive the rents, &c. till the election made, subject, &c.

Independently of the benefit actually supposed to arise to the infant in such a case, the Author is aware
 [249] of no principle, empowering the Court to take the intermediate possession of the real estate away from the infant heir, who was manifestly entitled to

it at law, and in equity, and to give it to one who was as manifestly not entitled to it; and who had but a precarious equitable chance of having the estate at a future period, if the infant, then ceasing to be an infant, should chose to abandon it to him.

The Author is the more anxious on the subject, because it appears clearly that the real estate could not superficially be affected even by any possible implication. The only obligation imposed by the will, was a forfeiture of the legacy, by an express condition; and this could only subject a party to take, or reject, the benefit, subject to the alternative, when he was competent to make his election. This is the precise point; and its extent; as to which, see *per Lord Eldon*, C. in *Sheddon v. Goodrich*, 8 Ves. 496, 497; and the distinction as taken from the cases in the note to *Allen v. Poulton*, (1 Ves. 122) *antea* 76. If, therefore, the will could not be looked at, so as to operate directly on the land, and nothing could affect the land, either at law or in equity, till the minority had ceased, when the party seized of it, would determine for himself, whether any thing should ever affect it at all; how (independently of any benefit to the infant, which does not appear) was it competent for a Court of Equity to divest the possession from the infant, or the receipt of the rents and profits from his guardians in the mean while?

As to the contrary, see *per Lord Hardwicke*, [250] C. in *Taylor v. Philips*, 2 Ves. 23. *Noys v. Mordaunt*, cited p. 12, is in 2 Vern. 581. *Prec. Ch.* 265. *Gilb. Rep.* 2.

Jenkins v. Jenkins, cited also p. 12, is likewise stated in p. 617 of the same volume.

As the Author of these notes believes it is unreported, and has a MS note of that case, he thinks its insertion may be serviceable to the profession.

JENKINS v. JENKINS, in Canc. Mich. 10 Geo. II.*November 20, 1736.*

David Lewis by will, dated November 22, 1699, gave to his grand-daughter *Anne Jenkins* 300*l.* to be paid her within five years after his decease, and to the other four children of his daughter *Eleanor* (being his four grandsons) he gave 200*l.* a piece, to be paid them within five years after his decease; and declared that no interest should be charged for either of the last mentioned sums to the appointed time of payment, and then the said last sums to be put to interest for the said children, by their father and mother, and the survivor. And also declared his intent to be, that in case any of the said children should die before such legacy became due, that then the legacy of such so dying should go amongst the brothers and sisters of the whole blood of such child, share and share alike; and made his son-in-law, *Thomas Jenkins* (husband to his daughter *Eleanor*) executor, and died the 29th [251] of the same month. *Eleanor*, the testator's daughter, had then five children besides the said *Anne*, viz. *David Jenkins* the elder, the plaintiff, the second *John*, *George*, and *William*. *Anne* died June 10, 1700; and *Eleanor* had another child, viz. the defendant, since the death of *Anne*, but before *Anne's* legacy became payable. *Thomas Jenkins*, the executor, expended 110*l.* in placing out the plaintiff to apprenticeship, and paid several debts of his, and maintained him after he came to age, and by his will in writing, in 1731, devised as follows: "Whereas I am executor to my father-in-law, *David Lewis*, who by his will gave my son *Thomas Jenkins* 200*l.* to be paid him as by the said will is mentioned; and there being also due on the death of his sister *Anne* 50*l.* which I am by the said will obliged to pay, I do therefore, in discharge of my said executorship, and out of affection to

my said son *Thomas*, give the said 250*l.* notwithstanding I paid 110*l.* thereof, to place him apprentice, and have maintained him with all manner of necessaries, and have paid for him at his request upwards of 200*l.* in discharge of his debts, and have maintained him these 20 years, for which payments, charges, and expenses, I insist upon no more than the interest of the 250*l.* and do give him the said 250*l.* notwithstanding the charge I have been at, and the payments and disbursements I have made as aforesaid, to be paid him by my executor within six months after my death, and I give the interest of the said 250*l.* to my executor, in satisfaction of the money by me paid, laid out, and expended, for my said son *Thomas* [252] *Jenkins*, and I do enjoin my said executor to take the said sum, and no more, in satisfaction thereof." He then gave the plaintiff all sums that were due to him from one *Pryce*, who afterwards became insolvent; and further devised to him a close in fee; and made the defendant executor and residuary legatee.

The plaintiff brought his bill for the 250*l.* and interest for five years after the death of *David Lewis*; and the defendant in his answer, insisted that the plaintiff ought to submit to the whole will of his father, and not take advantage of it in part, and avoid it in the other part.

The cause was first heard at the Rolls, when it was decreed that the child, which was born after the testator *Lewis's* death, and before the legacy of 300*l.* became payable to *Anne*, was entitled to a share with the other children; and likewise that the plaintiff was entitled to interest, as well for the 50*l.* which came to him upon *Anne's* death as for the 200*l.* devised to him by *Lewis*, and likewise to the land and money left him by his father *Thomas Jenkins*.

The question now was, whether the plaintiff was entitled both to the interest of the legacy of 250*l.* and also to what

was devised to him by his father, or whether his father's will should not be taken as a satisfaction for it.

Lord Chancellor [*Talbot*].—

As to the general demand, the plaintiff is entitled to the principal; but the question is, whether he hath not received a satisfaction for it by the money expended [253] upon him by his father in his lifetime: as on the one hand parents are bound to maintain their children, where the children have no subsistence of their own; so, on the other, where the child hath an annual income, the parent is not bound to let that accumulate, and maintain the child out of his own pocket, but may apply that income to the child's maintenance. In the present case, the child hath but 250*l.* in the whole, whereas the father had a good real and personal estate; and if what is sworn by one witness be true, the father had, in the year 1730, promised to pay both principal and interest, and to assign an estate by way of security for the growing interest; which shows no intent to set up so hard a demand against his child, whose fortune was so small in comparison of his own; and though he was persuaded afterwards to alter his opinion, and to revive his demand, yet, having been before waived by the transaction in 1730, he should not now be at liberty to revive it; so that if the case stood upon that point alone, I should make no difficulty of relieving the plaintiff. But then comes the will, whereby the father might impose what terms he pleased upon his own disposition, according to the rule in *Noys v. Mordaunt's case*, 2 *Vern.* 581, which is applicable to the present one; it being unreasonable to take a will by halves, and not to be supposed, that the testator would have made the bequest, had he known that the terms upon which he made it would not be complied with. In the present case, the testator never intended that the plaintiff should have this interest, and likewise take advantage of the devise of the close, and of the sum given him; and I do not think

there is any difference, where the devise is of money only, and where it is partly of money, and partly of land. In *Noys v. Mordaunt's* case, although land was by the will given in satisfaction of land, which might be said to differ it from this case; yet the land was of a different nature, which brings it to the same thing as it is here.

And so reversed the decree, and decreed, that the plaintiff do make his election, whether to take under the will, and to waive the interest of the 250*l.*; or to have the interest, and waive the advantage of the devise.

Herle v. Greenbank, cit. p. 13, is in 1 *Ves.* 290, and 3 *Atk.* 698.

Brudenell v. Bowton, stated p. 16, is in 2 *Atk.* 268; from whence it appears, that the operation of the codicil was considered as only a lessening of the quantum given by the will, though differently modified. Vide *ibid.* p. 273.

WARD *versus* SHALLET, July 26, 1750.

(No Entry.)

VOL. II. page 16.—Settlement after marriage, on wife, &c. good against the husband's creditors and assignees, having been made in consideration of her parting with a contingent interest secured by the bond of the husband to her before the marriage without the interposition of trustees. (1)

NOTES AND OBSERVATIONS.

(1) VIDE *Beaumont v. Thorpe*, 1 *Ves.* 27, et *antea* 25. *Blackerby's* case, cit. p. 17, is in 1 *Ves.* 347.

Fitzer v. Fitzer, cit. *ibid.* is in 2 *Atk.* 511.

As to Miss *Windham's* case, cit. p. 18, and the observations, see pp. 10 and 11 of the vol. with the notes on it, *antea* (247.)

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As to the case put by Lord C. p. 18, of the advance of a new portion, raising a good consideration, see also *Ramsden v. Hyllton, &c.* p. 308 of the vol. *et post.* ()

COXE *versus* BATEMAN, *August 1, 1750.*

(*Reg. Lib.* 1749. *A. fol.* 620.)

VOL. II. page 19.—Remedy for a breach of trust is personal; and money produced thereby laid out on an estate in Ireland, cannot be specially followed. The party's assets were, however, marshalled in favour of the claim.

CLAVEY *versus* HUNT, *August 1, 1750.*

VOL. II. page 19.—A deed may be evidence of an act of bankruptcy, though made in favour of creditors.

NOTES AND OBSERVATIONS.

Twine's case there cited is in 3 *Rep.* 80.

[256] TRAVERS, &c. Executors of LORD POWIS, *v.* EARL STAFFORD, and Mr. FURNESS, *October 15, 1750.*

(*Reg. Lib.* 1749. *B. fol.* 610.)

VOL. II. page 19.—If injunction be dissolved on the merits, another cannot be obtained, as of course, on an amended or supplemental bill. (1)

The injunction having issued irregularly—Held the defendant had not waived the objection by a mere application for time to answer the bill. Objections as to irregular process can only be waived by a party doing some act expressly founded on it, or amounting to a clear affirmance.

Award. The result of a reference under an order of the Court, viewed by the Court as a decree; and even stronger, since it supersedes all errors but corruption or partiality. (2)

NOTES AND OBSERVATIONS.

(1) *VIDE Bliss v. Boscawen, 7 Ves. & B. 101.*

It appears evidently from thence (as intimated by Lord *Hardwicke*, page 21,) that the Court does not hold a plaintiff to the strictness of stating the full strength of his case at first, without lending its assistance by injunction, on amended or supplemental bill.

The distinction is, that the case, as well as the motion, must be special.

(2) *Vide* page 21. *Sed quere*, whether it would supersede a clear mistake in law; and whether the Court, in such a case, would not hear such objections, as it does arguments against the reports of its Masters; or as it rehears, or reviews, its own decrees.

ANONYMOUS, *October 15, 1750.* [257]

VOL. II. page 23.—Orders for service of process discretionary. (1) Where neither the party, nor her clerk in Court, could be found, the Court ordered that the service of a subpœna to hear judgment, on her solicitor, should be deemed good service, if accompanied by a copy of the order left at the last place of abode.

NOTES AND OBSERVATIONS.

(1) It was held, in *Ratcliffe v. Roper*, 1 P. W. 420, that where a party's clerk in Court was dead, no process could be taken out against him, until he had appointed a new clerk in Court: and that a *subpœna ad faciend. attorn.* must be taken out for the purpose; the service of which, he absconding and denying himself, would be good if left at his house. And it seems now settled by *Franchlyn v. Colhoun*, 12 Ves. 2, and *Shillabar v. Langdon*, therein cited and stated from the Registrar's book by the Master of the Rolls, that where a party is avoiding service, and the clerk in Court is dead, the proper course is to move that service of a subpœna to name a clerk in Court may be good service, when made on the party's solicitor.

Though personal service is in general requisite, as a foundation for bringing a party into immediate contempt for non-compliance with a decree or order of the Court, it is yet dispensed with under particular circumstances; as in respect of a short order, after a party has had notice of the decree. *Rider v. Kidder*, 12 *Ves.* 202. Or where a party declared he would not execute an order, and absconded to avoid it. *De Manneville v. De Manneville*, *ibid.* 203. It is to be noticed, in respect of a passage referred to in this last case, p. 205, on the authority of the Practical Reg. as to service of a writ of execution on the clerk in Court being good service, [258] where the party was not to be found, that notwithstanding what is said in *Ellison and Pickering*, 8 *Ves.* 319, as to the want of any particular instance of this practice, it was allowed to be the course in *Ratcliffe v. Roper*, *ubi supra*; and that *Edwards v. Poole*, mentioned by the Lord Chancellor in the subsequent case of *De Manneville*, is an authority in point. See 12 *Ves.* 205, note (b).

As to the service of subpoenas to answer in cases of absconding, see *Wyatt's Prac. Reg.* 402; *Sir W. Pulteney v. Skelton*, 5 *Ves.* 147 and 260, note; and *Hunt v. Lever*, *ibid.* 147.

As to service of an order of sequestration, *nisi*, on the party's clerk in Court being good, see *Marq. of Lothian v. Garforth*, 5 *Ves.* 113.

TAYLOR *versus* PHILIPS, October 17, 1750.

(*Reg. Lib.* 1749. *B. fol.* 606.)

VOL. II. page 23.—Vide S. C. 1 *Ves.* 229, 230, et antea. (119)
 An infant's inheritance never bound by acts of the Court. As to a surrender of copyhold estate by feme covert, with her husband's privity and consent, but without his having actually joined in the act.(1)

NOTES AND OBSERVATIONS.

(1) SEE the former stage of this cause, where the points were raised, 1 *Ves.* 229 and 230, and the note thereon, *antea* 119.

It having been then referred to the Master to examine into the proposal of Sir *N. Edwards*, there stated, and to consider whether it was reasonable, and for the infant's benefit, &c.; he accordingly certified, that he found, upon searching into the Court Rolls of the several manors, that instances appeared therein of *feme covert*s having made surrenders of their copyhold estates with- [259] out their husbands actually joining with them in such surrenders; and that there were also many instances of *feme covert*s making surrenders jointly with their husbands; whereby it appeared to be doubtful, whether the surrender, which had been made in the case before him by *J. P.* without her husband's joining therein, was good or not: and it appearing to him that Sir *N. E.* was elderly and unmarried, and that the infant was his only next of kin, he was therefore of opinion, upon considering the whole matter, that the said proposal was reasonable, and for the infant's benefit, to have the same carried into execution.

The causes coming on as above, upon that report, and for further directions, &c. the report was confirmed, and the proposal therein stated [as to which see *antea, ubi supra*] ordered to be carried into execution, with the variations following; *viz.* "That the surrender to be made by the said Sir *N. E.* be made to the uses therein mentioned, on condition that *J. T.* the infant, do, when he shall attain his age of 21 years, confirm the estate for life to be limited to Sir *N. E.* by the surrender to be made of the copyhold premises. And this order is to be without prejudice to the plaintiff, the infant, after he shall attain his age of 21 years." *Reg. Lib. ubi supra.*

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Mr. *Chetwynd's* case, mentioned in page 23, is that of *Chetwynd v. Fleetwood*, 1 Bro. P. C. 300, octavo edition.

[260] FENHOULET *versus* PASSAVANT,

October 17, 1750.

(Reg. Lib. 1749. A. fol. 687.)

VOL. II. page 24.—Reference for scandal may be at any time; no so as to mere impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly relevant to the merits.

NOTES AND OBSERVATIONS.

(1) THE exceptions were accordingly overruled. *R. L.*

As to the above point, see *Coffin v. Cooper*, 6 Ves. 514; *Lord St. John v. Lady St. John*, 11 Ves. 526, &c.; and per Lord Eldon, C. 15 Ves. 477. Vide also *Anon.* 2 Ves. 631, *et postea*.

MELIORUCCHY *versus* MELIORUCCHY,

October 19, 1750.

(Reg. Lib. 1749. B. fol. 496.)

VOL. II. page 24.—If plaintiff is abroad, and the defendant becomes apprized of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause; such as applying for time to answer, &c.(1)

NOTES AND OBSERVATIONS.

SEE acc. *Craig v. Bolton*, 2 Bro. 609; and *Anon.* 10 Ves. 287.

The mere fact of the plaintiff having gone abroad, is not a sufficient ground for the Court to grant security for costs. *Hoby v. Hitchcock*, 5 Ves. 699.

As to some other points on this head, see *Seilaz v. Hanson*, 5 *Ves.* 261; *Ogilvie v. Hearn*, 11 *Ves.* 598; and *Gage v. Lady Stafford*, 2 *Ves.* 556, 557.

Ex parte WRIGHT, October 20, 1750. [261]

VOL. II. page 25.—In passing accounts of a lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs. (1) Lunatic's comfort considered in exclusion to the presumptive rights of his next of kin, &c. Lunatic not stripped of support by act of the Lord Chancellor even for creditors.

NOTES AND OBSERVATIONS.

In administering the lunatic's funds, &c. the Court never considers the next of kin, if their presumptive rights interfere in the least degree with the lunatic's comfort or convenience. Vide the note to *Owen v. Davies, antea* (61), which cites 2 *P. W.* 262, 265; 1 *Ves.* jun. 296; 2 *Ves.* jun. 72; and 6 *Ves.* 8.

Even for creditors the Court will not make an order, which will have the effect of reducing the lunatic to absolute want. *Ex parte Dikes*, 8 *Ves.* 79.

ANONYMOUS, October 22, 1750.

VOL. II. page 25.—Voluntary release by a party to his adversary not to defeat the Clerk in Court (1) of his lien for costs. If the suit had ended on a bona fide compromise for a reasonable consideration paid, it would have been otherwise.

NOTES AND OBSERVATIONS.

(1) SEE *Taylor v. Lewis*, 2 *Ves.* 111; and the note to it, *postea* (290).

BLINKHORN *versus* FEAST, October 24, 1750.

(Reg. Lib. 1750. A. fol. 104.)

VOL II. page 27.—Residue undisposed of held vested in executors beneficially, and no resulting trust for the next of kin, although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal.

NOTES AND OBSERVATIONS.

(1) THE testator gave the infant executors respectively, distinct parcels of his freehold and copyhold estate; the share of one appearing considerably larger than the other: to the former also he gave all the household goods that were in the house wherein he dwelt, and a mortgage of 60*l.* To the others he gave two mortgages; the one of 250*l.*; the other of 60*l.*; together with different sums of 40*l.* 20*l.* and 18*l.* due from other people, and appointed them joint and sole executors, &c. *Reg. Lib.*

As to these questions between executors and next of kin, see 1 *Ves.* 91, 162, 166, and 495; and also Mr. *Railby's* note to *Foster v. Munt*, 1 *Vern.* 473. See likewise *Roper on Leg.* 2 vol. 492, &c.; in which (as well as in some of the cases) it is observed, with great reason to be questionable, whether the interference of Courts of Equity, in preventing executors from deriving any benefit from their legal rights, has not been attended with greater inconvenience to society, from the multiplicity of suits, and the uncertainty and intricacy of the law upon the subject, than would have been the case, if the plain legal rule had been allowed to prevail generally, and without exception. See also *Langham v. Sanford*, 17 *Ves.* 435, &c. Affirmed on appeal by Lord *Eldon*, C. 14th Nov. 1816.

[263] On the subject in general, and as to a difference of opinion between the present Lord Chan-

cellor (Lord *Eldon*) and the Master of the Rolls (Sir *William Grant*,) see the case of *Gibson v. Clarke*, on appeal, 18 *Ves.* 247, &c. 252, 253-4-6, and 257, *note*; and *Southouse v. Bate*, 2 *Ves.* & *Beames*, 396, 398, 399.

Buffart v. Bradford, cited p. 28, is in 2 *Atk.* 220.

Foster v. Munt, cited p. 29, is in 1 *Vern.* 473. Vide particularly the note on it by Mr. *Raithby*. *Foster v. Munt*, is said to have been the first determination that executors, where there was no disposition of the residue, were trustees for the next of kin: yet see towards the end of Mr. *Raithby's* very useful and elaborate note on 1 *Vern.* 473.

In the principal case, an issue, *devisavit vel non*, was directed as to the real estate.

EAST *versus* COOK, October 30, 1750.

(*Reg. Lib.* 1750. *A. fol.* 91.)

VOL. II. page 30.—A. bequeaths 1000*l.* to such children as his daughter should leave at her death. B. her husband, receives it; and by his will, reciting that A. had promised to give it, (rather differently) but that he, B. was nevertheless desirous to make good A's intent and will, bequeaths it equally between his sons C. and D.; D. alone, survives his mother. Held, that C's representatives were not entitled; and that A's will would have prevailed, even if B. had intended to make a variation.

Election—Legacy in lieu of things expressed, shall not put the party to his election as to another benefit; though it may be contrary to an intent that he should take both.

NOTES AND OBSERVATIONS.

(1) EAST had received this legacy of 1000*l.* and had invested it, with a further sum, in the purchase of 1000*l.* bank stock.

William survived his father, who had given him a large residue, and made him sole executor, but died before his mother, leaving the defendant *Cooke*, and another, his executors.

The daughter was still living, and a defendant to the bill. She admitted she had released her [264] rights, in consideration of her father having settled 10,000*l.* upon her marriage.

The other defendants insisted, that the father became, for the above reason, a purchaser of his daughter's interest; and that, therefore, they, as the executors of *William*, his executors, &c. ought to stand in her place, and were entitled to her share.

They likewise submitted, that the bank stock, having been purchased, with other monies, of the father, added to the 1000*l.* bequeathed by *Gough*, and being then of the value of about 137*l.* *per cent.* the plaintiff could only be entitled to a proportionable part of the 1000*l.* in money, unless he would accept of one half of the bank stock, as given him by his father, in full satisfaction of his claims.

The decree was, however, made for a transfer to the plaintiff of the whole of the stock. See the judgment.

PEARCE *versus* CHAMBERLAIN, Oct. 30, 1750.

(*Reg. Lib.* 1750. *B. fol.* 588.)

VOL. II. page 33.—Articles of partnership do not survive for the benefit of executors, &c. without an express provision for such purpose.(1) Same as to assignees of a bankrupt. Rights, as between the parties in such instances; and through them the rights of their creditors.

NOTES AND OBSERVATIONS.

Baxter v. Burfield, cited p. 34, and mentioned at top p. 35, is in 2 *Str.* 1266.

(1) Per Lord *Eldon*, C. in *ex parte Williams*, 11 *Ves.* jun. 5. "The representatives of a de- [265] ceased partner, or the assignees of a bankrupt partner, are not strictly partners with the survivor, or the solvent partner: but still, in either of these cases, such a community of interest remains as is necessary,

until the affairs are wound up ; and as requires, that what was partnership property before, shall continue for the purpose of a distribution, not as the rights of the creditors, but as the rights of the parties themselves require. It is through the operation of administering the equities, as between the partners themselves, that the creditors have that opportunity ; as, in the case of death, it is the equity of the deceased partner that enables the creditors to bring forward the distribution."

THORNE *versus* WATKINS, Oct. 30, 1750.

(Reg. Lib. 1750. B. fol. 138.)

VOL. II. page 35.—English subject resident and dying in England, where his will was proved, but having debts and choses in action in Scotland—Held, that the latter were distributable as the rest of his effects.(1)

Debts follow the person of the creditor, not of the debtor.

As to debts due to a freeman of London.(2)

NOTES AND OBSERVATIONS.

(1) SEE *M. Anandale v. March'ss of same*, 2 *Ves.* 381; another branch of that cause, *Ambler* 80, and *Bempde v. Johnstone*, 3 *Ves. jun.* 198. See also, in particular, *Somerville v. Lord Somerville*, 5 *Ves.* 750, with the cases there cited ; especially *Balfour v. Scott*, *Dom. Proc. ibid.* p. 754.

(2) "Debts due to a freeman of London any where, are distributable according to the custom." Per Lord *Hardwicke*, C. p. 37. See also *Cholmley v. Same*, 2 *Vern.* 82.

Pipon v. Pipon, cit. p. 37, is in *Ambler*, 25.

ALLEYN *versus* ALLEYN, Oct. 31, 1750. [266]

VOL. II. page 37.—Satisfaction.—Devise of the residue of real and personal estate for life—Held not to be a satisfaction for a sum articulated to be laid out in lands.(1)

NOTES AND OBSERVATIONS.

(1) *VIDE Barret v. Beckford*, 1 *Ves.* 519, and the note on it, *antea* (219).

Upton v. Prince, cited p. 38, is in *Forr.* 71.

GLYNN *versus* BANK OF ENGLAND,

November 3, 1750.

(*Reg. Lib.* 1750. *A.* fol. 46.)

VOL. II. page 38.—Bill by executors on loss of notes mentioned in a list written by the testator.

Such a list not of itself evidence of the property, but left to be tried at law. (1)

As to the difference of proceeding in equity or at law on lost instruments; want of profert of bonds, &c. (2)

No decree for a plaintiff in equity on the evidence only of one witness in contradiction to a defendant's positive answer. (3)

The testimony of a witness read if he was indifferent when examined, though becoming interested afterwards.

NOTES AND OBSERVATIONS.

(1) *SEE* the same point determined in *Walmsley v. Child*, 1 *Ves.* 341. Et vide the notes on that case, *antea* (163). Note, however, the distinction made in *Lefebure v. Worden*, 2 *Ves.* 54, &c.

The case of *Serle v. Lord Barrington*, cited p. 40, is in 3 *Bro. P. C.* 593, octavo edition.

(2) See *Walmsley v. Child*, 1 *Ves.* 345, and the notes thereon, *antea* (163); also 15 *Ves.* 338.

(3) See page 42, 1 *Ves.* 66, 97, 125, and the note, *antea* (50), to *Le Neve v. Le Neve*, 1 *Ves.* 66.

(4) *Vide Gosse v. Tracy*, 2 *Vern.* 699, and 1 *P. W.* 287; *Haws v. Hqd.*, 2 *Atk.* 615.

Brograve v. Winder, 2 *Ves.* jun. 634; and *Pryse v. Lloyd*, 2 *Ves.* 374, et *antea* (210).

[267] Although it is stated, page 43, that there was "no instance where entries made by a party had

been admitted as evidence, after any length of time;” this means, they had not been admitted as original substantive evidence of a fact; and not that they were always to be excluded; since it appears from *Lefebure v. Worden*, 2 *Ves.* 54, *post.* 270, that they may be allowable evidence of a claim actually made, &c. &c.

ATTORNEY GENERAL *versus* MEYRICK,
November 6, 1750.

VOL. II. page 44.—Rolls. Sir John Strange, M. R. Devise to a charity by mortgagee in possession of all monies due on his securities, is within the Mortmain act, 9 Geo. II. c. 36.(1) So likewise of turnpike tolls, and money on security of poor's rates and county-rates.

NOTES AND OBSERVATIONS.

(1) *VIDE S. P. Attorney General v. Caldwell, Amb.* 635; *Pickering v. Lord Stamford*, 2 *Ves.* jun. 272, 279, and 581; and in 3 *Ves.* jun. 332 and 492; *Howse v. Chapman*, 4 *Ves.* 542. So likewise as to turnpike tolls, *Knapp v. Williams*, in a note to *Corbyn v. French*, 4 *Ves.* 430; and *Howse v. Chapman, ubi supra.*

So as to money secured by assignment of poor-rates and county-rates. *Finch v. Squire*, 10 *Ves.* 41.

Maundy v. Maundy, cited p. 46, is in 2 *Stra.* 1020.

The statute referred to at bottom of p. 47, is 11 and 12 *W. III.* c. 4. See also per *M. R.* 2 *Ves.* jun. 283.

It seems the principal case of *Attorney General v. Meyrick*, was the first decision on the subject, agreeably to what Sir *J. Strange*, M. R. observes at the end of the case, p. 47. *Vide* 2 *Ves.* jun. 279, 280.

BAILIS versus GALE, November 6, 1750.

(*Reg. Lib.* 1750. *A. fol.* 149.)

VOL. II. page 48.—Devise of all that “estate” testator bought of M. held to pass the fee.(1)

So held also as to another clause which was a devise of “the reversion” of that tenement his sister lived in after her death.

Held contra as to other devises(2) being, first, “all those houses he bought of T. W. containing three dwellings, with all their appurtenances,” and next as to a devise of “that tenement in the possession of M. B. presently after his death.”

NOTES AND OBSERVATIONS.

(1) As to the word “estate” in a will, naturally meaning the interest, rather than the mere subject matter, vide *Goodwyn v. Goodwyn*, 1 *Ves.* 226, 228, and the notes on it, *antea* (117.)

(2) Besides the requests noticed in the Report, it seems material to observe, that it appears from *Reg. Lib.* the testator gave also to *Charles* “those houses he bought of *F. W.* containing three dwellings, with all their appurtenances.” And also after the devise of the above mentioned reversion, “that tenement in the possession of *M. B.* presently after his decease.” Though it is very probable that he might mean to give the whole of his interest in each of these particulars, the Court nevertheless was under the necessity of confining the devise to a limited interest; and therefore declared, that “as to these estates [alone,] *Charles* was entitled only for his life.” The observation seems rather important, since it is impossible for any distinction to be more strongly marked, than what appears in this case, taken altogether, and arising, as it does, upon the very same instrument.

MOGG *versus* HODGES, November 16, 1750.

(*Reg. Lib.* 1750. *B. fol.* 611.)

VOL. II. page 52.—Assets not marshalled in support of a devise contrary to law(1) as a gift to a charity.

Money directed to be laid out in lands for such an illegal purpose, shall not be laid out for the heir, but the trust is void altogether.

As to the testatrix's real estate which was devised to be sold partly for such purposes, the heir was declared entitled to the surplus proceeds.

Money due by testatrix at her death in respect of suits instituted by her relative to her real estates, held to be a charge upon her real estate; and that the personal estate was wholly exempt.(2)

NOTES AND OBSERVATIONS.

(1) *VIDE* in *Arnold v. Chapman*, 1 *Ves.* 110, *et antea* (72.)

Dalton v. James, cited p. 53, is in *Ambler* 20; *et vide* *ibid.* 158.

(2) The testatrix had instituted some suits relative to her real estate. The Master was directed to take an account of what was due from her at her death, to an attorney, solicitor, or agent employed by her in these suits; and also of all such sums of money as had been paid or laid out by the defendant, her trustees, or which they were liable to pay on account of such suits: and it was declared, that what should be so found due, was not to be considered as a debt on the testatrix's personal estate, but as a charge upon her real estate, and to be paid thereout, &c. The heir was declared entitled to the surplus of the proceeds from a sale of the real estate, after these and other charges. *Reg. Lib.*

It should be observed, that the words of the decree are "in the suits in the Court of Chancery mentioned in her will." No ground, however, as to the suits being mentioned in the will, is to be collected from the pleadings. One of the answers states the fact of the suits being

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instituted by her, but without any reference to
[270] the will in this respect. *Query*, whether there
may not be an omission in *Reg. Lib.* of the words
“ relative to the estates, mentioned in her will,” &c.

LEFEBURE *versus* WORDEN, Nov. 16, 1750.

(*Reg. Lib.* 1750. B. fol. 104.)

VOL. II. page 54.—A person's own entry in books of account allowed on inquiries before the Master as evidence of a claim made in his lifetime; but not as original or positive evidence of the fact. (1)

Entry by servant or agent usually employed in such matters allowed as good evidence upon proof of his death.

NOTES AND OBSERVATIONS.

(1) SEE in *Glynn v. B. of England*, 2 *Ves.* 43, *et antea* (267.)

Sir *Biby Lake's* case, mentioned p. 55, is also cited 2 *Ves.* 43.

SEDGWICK *versus* HARGRAVE, Nov. 22, 1750.

(*Reg. Lib.* 1750. B. fol. 133.)

VOL. II. page 57.—Rolls. Sir J. Strange, M. R. Conditional decree.

A wife having an equitable interest in customary estate of small value, her husband, on a family arrangement, receives a comparatively large sum for the relinquishment of their rights. An intermediate suit having been instituted, the husband and wife in a joint answer (1) disclaimed all interest; and in that suit there were no further proceedings.

The present bill being filed a long time afterwards, the husband and wife again put in a joint answer, claiming the estate in the wife's right. The Court could not make any personal decree on the wife; and could only direct the husband to account for the 200*l.* he had received, with costs, in case he did not join, and procure his wife to join, (2) in the proper assurances. This 200*l.* having been paid by the wife's father by way of exone-

rating his real estate from a supposed intail, was held to belong to his grantee of that estate, and not to his personal representative. (3)

NOTES AND OBSERVATIONS.

(1) THE Master of the Rolls, in this case, seems to have been led, by his indignation at the unconscionable defence set up on the part of the husband and wife, into observations, which the author humbly submits would be untenable in point of law, as general propositions.

His Honour is reported (p. 59) to lay great [271] stress on the wife having put in a joint answer with her husband in the first suit, not complaining of the transaction, and wishing the 200*l.* to be retained in lieu of the estate: and again, his Honour relies on the great length of the adverse possession.

The Author of these notes ought to be diffident in canvassing the opinion of so great a Judge as Sir *J. Strange*; but he must, as a lawyer, submit, that the long coverture was a sufficient answer to the argument on the length of the adverse possession; and also, that a joint answer of a husband and wife, in common cases, is nothing more in the view of the Court, than the mere answer of the husband.

The observation that “she might have applied to answer it separately,” does not seem conclusive; since it could only have made the objection formally, which the law would maintain for a *feme covert*, whether put on the record or not.

Since writing the above, the author of this work has been favoured by Mr. *Edward Nares* with a sight of Sir *John Strange*’s own notes of the principal case. The arguments were at great length, and, with the judgment, seem to have taken up two days at the Rolls. Amongst other arguments on the part of the wife, are some to the effect above submitted, in the following terms: “What her husband did in 1710 will not bind her; and till his

ration of an annuity of 15*l.* to be paid to the latter for life. The bill stated, that by the custom of the manor, estate tails were docked by deed and admittance, and not by recovery, or act equivalent thereto.

The decree was, "that the defendant *Hargrave* should join in the proper assurance, and procure his wife so to do. If the defendant *H.* did join in such conveyances, and did likewise procure his wife to join, &c. his Honour did not think fit to give costs on either side, as between the plaintiff and them; but if not, then the defendant *H.* was to refund the 200*l.* received by him on the foot of the agreement in 1710, and pay the plaintiff his costs of the suit." *Reg. Lib.*

(2) It should be particularly observed, that Lord *Eldon*, C. in the case of *Emery v. Wase*, on appeal, 8 [275] *Ves.* 505, very much disapproved of the Court's subjecting *femes covert*s to the disagreeable alternative, resulting of necessity from decrees that their husbands should procure them to join in furtherance of their own agreements; although the Courts had done so at various times, and in various instances. See that case, and more especially pp. 514, 515, &c.

(3) See the report of the principal case, p. 60. It seems that the plaintiff, besides being the heir at law, was also customary heir of the father as to the estates in question, which came *ex parte paterna* [and argument is built upon this in Sir *J. Strange's* note book.]

This circumstance does not appear distinctly noticed in the report; but it may be remarked, and the more especially, since it may account for what the Master of the Rolls says, towards the bottom of p. 59 of the report, that the purchaser "might be safe in taking a conveyance from the plaintiff, there being no legal estate standing out." The other reason, "of the long possession," there appearing, must, it should seem, evidently be discarded, for the reasons above submitted.

The author of these notes, upon the whole, and after repeated consideration of the whole case, by no means objects to the decree, under the peculiar circumstances. The only objection he makes is as to the positions reported p. 59, taken in general; or relative to a wife being positively bound by an answer put in jointly with her husband.

In the case before His Honour, much might be said as to that particular defendant being bound; because, having put in two joint answers, the one contradictory to the other, which of them could be considered as her defence, since she must be considered as before the Court? The argument, therefore, that if she had objected on the former occasion, she might have answered separately, was a very natural one, though not conclusive. On that account, this seems the proper place for another observation appearing from Sir *J. Strange's* notes to have been made by the plaintiff's leading counsel. It is as follows: "the husband cannot say the wife is not in his power, for they join in an answer; and if not, he must have shown she was not in his power; else process of contempt would have gone against her, for want of her answer."

PARSONS *versus* DUNNE, Nov. 23, 1750.

(*Reg. Lib.* 1750. *B. fol.* 89, entered "*Parsons v. Parsons.*")

VOL. II. page 60.—Election to be made by a feme covert resident abroad, cannot be effectuated under a power of attorney, &c. from the husband and wife, or any thing short of a commission, or as near thereto as possible.

NOTES AND OBSERVATIONS.

THE matter before the Court, on the petition mentioned in the report, was a question of election; namely, whether Mrs. *Dunne* would take her share of her father's personal

estate according to his will, or according to the custom of London? and further, whether she consented to be bound by the account and agreements contained in the deed, memorandum, and order, stated in the petition? *R. L.*

The signature and certificate of the commissioners "was to be properly attested before some notary public at Paris, or verified by affidavit." *R. L.*

D. OF MARLBOROUGH *versus* L. GODOLPHIN,
[277] *November 26, 1750.*

(*Reg. Lib. 1750. A. fol. 97.*)

VOL. II. page 61.—Lapsed legacy. Power. Devise of 30,000*l.* to testator's wife for life, and afterward to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint.(1) She, having married again, appoints by will (*inter alia*) unto two of the children who died in her life-time. Held, that their representatives were not entitled; and that the shares so appointed to them lapsed, and fell into the residue.

Construction.—Courts of Law and of Equity will equally transpose words in instruments to make the limitations intelligible, and attain the party's clear intent; but never to defeat the interests given, or let in more than expressed.(2)

Will by Feme Covert good, and proveable in the Ecclesiastical Court, if made with assent of her husband.(3)

Appointee under a power, must claim not only under the power, but according to the nature of the instrument under which it is executed. If an instrument is to operate as a will for the execution of a power, it must have all the incident consequences of a will. In the case of a will to pass lands by virtue of a power, it must be executed according to the provisions of the statute of frauds. And so in the case of a testament to pass personalty under a power; it must be such an instrument as is capable in its own nature of passing personal estate.(4)

So in the case of copyholds surrendered to the use of a will, and certain uses appointed by will, if the appointee die in the testator's lifetime, his representative cannot take any benefit; although the rule is generally, that copyhold lands pass by the surrender. The reason is, that the act is not complete in such case, from the non-operation of the will in the testator's lifetime. When the execution of a power is by will, and is not

expressed in the precise words which would be required in a deed, as under a clear intent to create an estate tail, though not formally worded, there the Court will effectuate such intent, notwithstanding the appointee takes, in some sense, under the power.

And so in like cases(5) where, in any power, there is also one of revocation, and to appoint new uses, and the power itself is executed without any like reservation of a new power to revoke, the act (if substantive from the nature of the instrument) is irrevocable.(6)

Appointee under a power, takes under the authority of that power, as if therein mentioned nomination, in so far as relates to the substance of the benefit; but he does not take as from the time when the power was created.(7)

Mere powers construed strictly:—Powers coupled with an interest construed liberally.(8)

Tenants in common may be of unequal shares, but not of uncertain shares.(9)

An executor or residuary legatee stands in the same light, as to personalty, as an heir does to the realty; so as to take all that falls in beyond the intent of the testator; as by operation of law.(10)

NOTES AND OBSERVATIONS.

THE codicil is stated verbatim, 5 *Ves. jun.* 506; but it does not differ from the abstract of it in the report.

(1) This case is certainly very difficult to be reconciled with *Harding v. Glynn*, (mentioned p. 67, and reported shortly 1 *Atk.* 469, but stated from *Reg. Lib.* 5 *Ves. jun.* 501.) or with *Brown v. Higgs*, 4 *Ves.* 708, and 5 *Ves.* 495, and 8 *Ves.* 561. See *per* Lord *Eldon*, C. 8 *Ves.* 576. The distinctions taken in such cases between powers and trusts have been called very nice; but it seems that the two cases above mentioned, proceeded upon the ground of a gift and a trust, which involved a duty to execute it; while in this principal case there was no gift, and the wife had a mere power.

It should be observed, that although Lord *Eldon* did not reverse the decree in *Brown v. Higgs*, he said he should never cease to entertain doubts upon the will in that case.

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. As to various cases on the several points, see them collected in Mr. *Sanders's* note to *Harding v. Glynn*, 1 *Atk.* 469.

In page 62, instead of the words "after mentioned," having reference to the children of Lord *Sunderland*, as stated in the report, they should have been inserted as referable to the proportions, namely, "in the proportions after mentioned."

[278] *Ross v. Ewer*, cited p. 63, is in 3 *Atk.* 156.

Rich v. Beaumont, stated p. 64, as in *Dom. Proc.* February 11, 1726, was not decided then, but on February 9, 1727, vide 6 *Bro. P. C.* 152, octavo edition, and the folio edition, vol. 3, p. 308.

Madison v. Andrew, mentioned page 65, is in 1 *Ves.* 57, *et antea* 45.

Oke v. Heath, *ibid.* is in vol. 1, 135, *et antea* 82.

As to *Harding v. Glynn*, as mentioned p. 67, see it stated from *Reg. Lib.* 5 *Ves.* jun. 501. Et vide Mr. *Joddrell's* note of it, 8 *Ves.* 571. The operation of the devise in *Harding v. Glynn*, as a trust (as observed in the argument of the principal case, p. 67) was the express point; the power having been coupled with a duty to execute it. This distinction alone (as it seems) can support its authority, and that of *Brown v. Higgs*, *ubi supra*, against that of the principal case, see 8 *Ves.* 570, 571, 573, 576. *Jones v. Westcomb*, cited pages 67, 68, is in *Prec. Ch.* 316, and 1 *Eq. Ca. Ab.* 255. It is also cited in *Avelyn v. Ward*, 1 *Ves.* 421.

Fonnereau v. Fonnereau, cited p. 68, is in 3 *Atk.* 315.

Madison v. Andrews, cited *ibid.* is in 1 *Ves.* 57.

Bainton v. Ward, cited p. 69, is incorrectly reported 2 *Atk.* 172; more correctly stated, 2 *Ves.* 2, and from *Reg. Lib.* 7 *Ves.* 503, note.

Oke v. Heath, mentioned p. 72, is reported 1 *Ves.* 135, *et antea* 82.

Burnet v. Holgrave, *ibid.* cited and reported *Eq. Ab.*

296, cannot be of authority. Vide per Lord Hardwicke, C. 1 *Ves.* 140. It is reported imperfectly in *Eq. Ab.* See 2 *Ves.* 80.

(2) See page 74 of the report. [279]

(3) See page 75.

(4) See pages 76 and 77.

(5) See page 77.

(6) See page 77.

Hele v. Bond, cited *ibid.* is also mentioned in the same vol. 211.

(7) See page 78.

(8) See page 79, et vide *Zouch v. Woolston*, 2 *Burr.* 1136.

(9) See page 81.

(10) See page 83, et vide *Durour v. Motteux*, 1 *Ves.* 320, et *antea* (157.) *Brown v.* [280] *Higgs*, 4 *Ves.* 708, &c. 2 *Roper on Legacies*, 487, &c. &c. &c.

As to the observations in the report p. 83, upon the words "give" or "devise," &c. see Mr. *Sanders's* note to *Harding v. Glynn*, 1 *Atk.* 469; 1 *Ves.* jun. 270, and 2 *Ves.* jun. 33, et 529.

HORSELY versus CHALONER, Dec. 4; 1750.

(*Reg. Lib.* 1750. *A. fol.* 117.)

VOL. II. page 83.—Bequest to younger children of testator's son, to be paid at 21; held vested in those born at the time of testator's death.

Though the Court is not strict in holding executors, who have acted fairly, to an admission of assets; yet in this case, circumstances tending to show that the defendant had admitted assets several years before, and he having obtained a release, which the Court held to be fraudulent, a personal decree was made against him for the legacy and interest, with costs.

NOTES AND OBSERVATIONS.

Graves v. Boyle, cited p. 84, of the report is in 1 *Atk.* 509.

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Madison v. Andrew, cited *ibid.* is in 1 *Ves.* 57, quod vide, *et antea* 45.

Coleman v. Seymour, cited *ibid.* is in 1 *Ves.* 209, *et antea* 113.

See page 84.—The plaintiff applied for payment of her share of the 200*l.* and interest, upon her coming of age in 1746, and the defendant *Chaloner*, the executor then claiming also to be a mortgagee upon part of the testator's estate, a bill was filed for an account, and to have the residue applied in discharge of his mortgage debt, &c. That suit was afterwards referred to arbitration, and an account taken by the referees; upon which, as the present bill alleged, "it appeared that there was an overplus of 50*l.* in the defendant's hands above what was sufficient to answer the legacy of 200*l.*, which last mentioned [281] sum was retained in his hands to answer such legacy, when payable." The present bill also stated, that the defendant admitted, that he them made and signed an indorsement on the mortgage, purporting to be an acknowledgment that he the defendant had received 50*l.* towards the mortgage.

The plaintiff stated by supplemental bill that the original cause being at issue, and witnesses examined, and a reference to arbitration having taken place, the defendant afterwards took advantage of the plaintiff having no person present to advise with her, and procured her, under a false suggestion, to sign what he called a note, but which she afterwards found was a release. The defendant stated the release to have been fairly executed, and that the plaintiff was to have had 25*l.* (being half of the balance of 50*l.* in his hands) in consideration of it, but that she afterwards refused to take it. He insisted that this was all that was due to her; and urged, if the indorsement tended to admit that he had retained the 200*l.* in his hands to answer the legacy, the referees and parties concerned, had imposed upon him. He stated, that "he waived the benefit

of the general release, since the plaintiff refused to accept of the 25*l.*, the consideration thereof, and was willing to deliver it up to be cancelled." *Reg. Lib.*

The Court decreed the release to be set aside for fraud, and delivered up to be cancelled; and it directed the defendant to pay the costs of the suit. *Reg. Lib.*

EYRE *versus* EYRE, Dec. 4, 1750. [282]

(*Reg. Lib.* 1750. *A. fol.* 643.)

VOL. II. page 86.—Plaintiffs intending to lend money to their brother in the East Indies, pay it to his agent in England, who remits in bullion. The brother was dead when the advance was made: his executors send the value of the bullion back to England, where it is received by the father. The agent's authority being revoked by the death of his principal, held it was no loan to the brother. The Court declared that the proceeds so received by the father ought to be answered out of his estate: but the parties compromised the matter at a less sum.

NOTES AND OBSERVATIONS.

It appears from *R. L.* that the proceeds of the bullion were remitted to, and received by, the father, *Christopher* himself, notwithstanding what appears at the conclusion of the case. The parties were not left to proceed at law. The bill was dismissed only as to *Lock*, and the *East India Company*.

As to the rest, it was declared, "it appeared that the total amount of the effects which were considered by the executors and trustees of the will of *R. E.* the younger, as the assets of the said *Robert Eyre*, was the sum of 2828*l.* 19*s.* 1*d.* and that *Christopher E.* had thereout paid and retained, on account of the bond creditors of *Robert*, the sum of 2281*l.* 15*s.* 5*d.* so that there remained the sum of 543*l.* 3*s.* 8*d.* which was considerably less than appeared by the account annexed to the answer to be the produce of the chest of bullion, which had been purchased with

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the monies advanced by *Christopher*, and by the plaintiffs; which appearing to have come to the hands of *Christopher*, ought to be answered and paid out of his personal estate, and out of his real estate charged with his debts by his will. Wherefore, by consent of the plaintiffs and the defendants, the executors and devisees [283] of *Christopher*, it was decreed, that such sum of 543*l.* 3*s.* 8*d.* should be divided proportionably between the plaintiffs in respect of their demand, and the defendant, the representative of *Christopher*, in respect of his demand of the sum advanced by him to Mr. *Lock*, at the same time, and on the same account." *R. L.*

GOWER *versus* MAINWARING, Dec. 5, 1750.

(No Entry.)

VOL. II. page 87.—Vide S. C. afterwards 2 Ves. 110. Trust deed, whereby trustees were to give the residue of A's estate "among his friends and relations where they should see most necessity, and as they should think most just." (1)

Though in other cases the Court will not interpose where trustees, declining to act, have a power to distribute generally according to their discretion, without any defined object, it was held that here a rule was laid down; the word "friends" meaning "relations:" and that the Court could judge of the respective families' necessities and occasions by a reference to the Master.

NOTES AND OBSERVATIONS.

(1) VIDE *Goodinge v. Goodinge*, 1 Ves. 231, 232, *et antea* (122), and in *Pyot v. Pyot*, 1 Ves. 335, 337, *et antea*, 161.

The case cited, page 88, of *Sir Coniers Darcy v. Lord Holderness*, is also cited 1 P. W. 704, note.

ASKEW versus The POULTERERS' COMPANY,

December 6, 1750, [and June 6, 1751.]*

(*Reg. Lib. 1750. A. fol. 425.)

VOL. II. page 89.—On loss of a deed, &c. the same rule of evidence here, as at law. (1) Loss of deed can only be made out by circumstances. The destruction of a deed, &c. by affidavit. Decree in a former cause between the same parties, read as evidence, though not conclusive. So also of depositions in a cause which had settled the rights of all; as under a decree for performance of trusts.

NOTES AND OBSERVATIONS.

(1) SEE also 1 *Ves.* 233. This was the sound doctrine; but the Courts of law since Lord *Hardwicke's* time seem to have “amplified their jurisdiction” on the point in question to a degree almost of legislation. It certainly, for instance, was the law in the greater part of Lord *Hardwicke's* time; and it was that great Judge's express opinion that no action could be brought upon a bond, without a *profert in curia*; so that in the case of a lost bond, the remedy was alone in equity. See in *Walmsley v. Child*, 1 *Ves.* 345, and *Whitfield v. Fawcett*, *ibid.* 392, 393, *et antea*, 163 and 169; and in *Ward v. Turner*, 2 *Ves.* 442. The Courts of law have, however, since taken cognizance of such matters; see *Read v. Brookman*, 3 *T. R.* 151, and many subsequent cases. The wisdom of “keeping the ancient paths,” and the inadequacy of the remedies of such a new tried, and self-created jurisdiction, is fully shown by the judicious observations of Lord *Eldon*, C. in *ex parte Greenway*, 6 *Ves.* 812, 813; in 7 *Ves.* 20, &c.; and in 9 *Ves.* 466, &c. As to which also, vide note on

* There is no entry in R. L. referable to the period mentioned in the report. On the 6th of June following, however, the bill was dismissed without costs, by consent. Reg. Lib. ubi supra.

Walmsley v. Child, 1 Ves. 345, *antea* (163): and 15 Ves. 338.

[285] BISHOP of CLOYNE *versus* YOUNG,
December 7, 1750.

(*Reg. Lib.* 1750. *A. fol.* 151, entered "*Berkely v. Young.*")

VOL. II. page 91.—Testator, manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee; it was held that the executors were not entitled to the surplus. (1) Where parol evidence can be read to show no resulting trust, like evidence may be read contra, to disprove the implication from the former. (2) Legacy to one alone of two (or more) executors, will not exclude either. (3) Legacy to the daughter, &c. of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. (4)

NOTES AND OBSERVATIONS.

(1) VIDE also *Lord North* and *Guilford v. Purdon*, 2 Ves. 495. *Blinkhorn v. Feast*, 2 Ves. 27, *et antea* (262;); likewise *Andrew v. Clark*, 2 Ves. 162; and *Wilson v. Ivat*, 2 Ves. 166, *et postea* (). See also *Griffiths v. Hamilton*, 12 Ves. 298 to 310; and *Langham v. Sanford*, 17 Ves. 435, &c. affirmed on appeal by Lord Eldon, C. Mich. T. Nov. 14, 1816.

(2) Vide 12 Ves. 298 to 310; and *Langham v. Sanford*, 17 Ves. 435, as well as *per* Lord Eldon, C. on the appeal, Nov. 14, 1816; when that case shall be reported.

(3) Vide also in *Blinkhorn v. Feast*, 2 Ves. 27, *et antea* (262;); and *Wilson v. Ivat*, 2 Ves. 166, *et postea*.

(4) And it was held by Sir J. Strange, M. R. that an executor was not excluded by a real estate given to his wife; see *Wilson v. Ivat*, 2 Ves. 166.

In the principal case, immediately after the "&c." mentioned in the report, at the end of the first paragraph, the testator wrote "Dated at Evely, this 19th day of Nov. 1746." *R. L.* This seems not quite immaterial. The

author thinks that an argument might have been raised in favour of the executors, if the instrument had ended merely with the “&c.” since it might have been said it was an omission merely occasioned by an [286] interruption, or the like; but which the testator would (if at all requisite) have remedied by inserting the names of his executors again. As, however, there were consecutive words, all such inference is negatived, and the “&c.” resembled to the precise case of an intermediate blank, as in that of *Lord North and Guilford v. Purdon*, 2 Ves. 495.

The defendants (*inter alia*) insisted, that the defendant *Brown* had no legacy given to him; and hoped, that the legacy given to his children neither was, or ought to be considered as a beneficial legacy to him, in any respect to deprive him of the right he had as executor, &c.; and that his younger daughter, and his niece, were near 21, at the testator's death. That, notwithstanding the bequest to *Young*, they were entitled, &c. That there was no blank vacant space left in the will, wherein the name of any residuary legatee could, or seemed designed to have been, inserted; and that they did not believe the testator ever designed to appoint the plaintiffs his residuary legatees. That they, the defendants, had been acquainted, and in the greatest intimacy and friendship with the testator for many years, and that the defendant *Young* had often paid money for, and lent money to, him without charging interest for it. They stated also various circumstances in which the testator had received great benefits from them, and particularly from *Brome* and his father, and that he was sensible of this. They stated, moreover, that the testator in a former will had made *Brome* his executor, and given him a legacy, and made his [287] daughter and niece residuary legatees of his whole personal estate, whereas *Brome* had not so much as a ring left him by the testator's last will, nor would he re-

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ceive any return for the great and many services he had done him, unless he was entitled to a share of the residue.
R. L.

Foster v. Mount, cited page 92, is in 1 *Vern.* 473. Though it has often been said to have been the first case on the subject, there are traces of some earlier. See as to this, and various distinctions arising on most of the cases in Mr. *Raithby's* elaborate note on 1 *Vern.* 473, &c. *Page v. Page*, cited p. 93, is in 2 *P. W.* 488; as to which see also 1 *Ves. jun.* 66, 67, and the note. *Painter v. Salisbury*, cited *ibid.* is again mentioned p. 99, and is the case referred to by the M. R. towards the top of page 167; see also 1 *Ves. jun.* 66. *Wheeler v. Sheers*, cited also p. 93, is in *Mose*, 290. The Duchess of *Beaufort's* case, cited p. 94, is in 2 *Vern.* 648. *Griffith v. Rogers*, cited *ibid.* is in *Prec. Ch.* 231. *Blinkhorn v. Feast*, cited *ibid.* in 2 *Ves.* 27, *et antea* (262), *quod vide.* *Littlebury v. Buckley*, cited p. 95, is in 1 *Eq. Ab.* 245, *pl.* 9.

- OATES *versus* CHAPMAN, Dec. 8, 1750.

VOL. II. page 100.—S. C. 1 *Dick.* 148. 1 *Ves.* 542, 543, *et antea* (241.) *Qod vide.* Costs refunded, upon the reversal of an order which had allowed a demurrer.

[288] BISHOP *versus* CHURCH, Dec. 12, 1750.

(*Reg. Lib.* 1750. *A. fol.* 106.)

VOL. II. page 100.—S. C. 2 *Ves.* 371, *et postea* (), *quod vide.* Depositions of a witness being too general, he was directed to be examined upon interrogatories before a Master. Relief on bond misdrawn by mistake; and a just demand out of assets will be satisfied in Equity though there be no remedy at law from the nature of the instrument, &c.(1)

NOTES AND OBSERVATIONS.

(1) VIDE 2 *Ves.* 371, et *Thomas v. Frazer*, 3 *Ves.* 399. *Burn v. Burn*, *ibid.* 573. *Gray v. Chiswell*, 9 *Ves.* 118, 124, 125, et per Lord Eldon, C. 10 *Vesey*, 227.

As to the argument, p. 101, upon a lost bond, see *Walmsley v. Child*, 1 *Ves.* 345, et *antea* (163), and *Whitfield v. Fawcett*, 1 *Ves.* 392, 3, et *antea* 169. So likewise *antea* 284.

Simpson v. Vaughan, cited p. 101, is in 2 *Atk.* 31. *Blundell v. Barker*, cited *ibid.* is in 1 *P. W.* 634.

Probart v. Clifford, cited p. 102, is in 1 *Atk.* 440, and *Ambler* 6.

Primrose v. Bromley, cited *ibid.* is in 1 *Atk.* 89.

SALKELD *versus* SCIENCE, Dec. 14, 1750.

(Reg. Lib. 1750. B. fol. 671.)

VOL. II. page 107.—As a plea containing an exception of matters thereinafter mentioned is bad, and must be over-ruled; so a plea of a release (1) “further and other than in the plea set forth,” is incorrect, though not sufficient to over-rule it. (2) It was therefore ordered to stand for an answer with liberty to except.

NOTES AND OBSERVATIONS.

[(1) A PLEA of a release ought to set out the consideration on which the release was made, *Hardr.* 163; and the release ought to be under seal; otherwise it must be pleaded as a stated account only. *Gilb. Ch.* 57. Note to the third, or Irish edition of *Ves.*]

(2) The report says, the plea would have been [289] proper, if the exception had been “other and further than is in the release hereinafter mentioned.” See page 108.

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WEAVER *versus* EARL OF MEATH, Dec. 14, 1750.

(*Reg. Lib.* 1750. *B. fol.* 544, entered "*Weaver v. Brabazon.*")

VOL. II. page 108.—Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, and not extending to matters collateral.

NOTES AND OBSERVATIONS.

[In all cases of forfeiture, if plaintiff alone is entitled to it, and waives it, defendant must discover; and though plaintiff is not entitled to the forfeiture, yet if defendant binds himself not to insist on being protected from discovery, the plaintiff will compel him to make it. *Mosely* 75. Note to the third, or Irish edition of *Vesey*.]

GREGOR *versus* MOLESWORTH, Dec. 14, 1750.

(*Reg. Lib.* 1750. *A. fol.* 158.)

VOL. II. page 109.—Length of time proper for a plea, but not for a demurrer.(1)

NOTES AND OBSERVATIONS.

(1) It was, however, decided *contra*. See in *Hardy v. Reeves*, 4 *Ves.* 479; and *Sherrington v. Smith*, *Dom. Proc.* 2 *Bro. P. C.* 62, octavo edition; and 1 *Bro. P. C.* 95, folio.

[290] CHILD *versus* BRABSON, Dec. 18, 1750.

(*Reg. Lib.* 1750. *A. fol.* 62.)

VOL. II. page 110.—Defendant in custody for want of further answer, putting it in, will be discharged on paying the costs of the contempt. If that answer, or any further one, proves to be insufficient, the plaintiff may resume the process where it left off.(1)

NOTES AND OBSERVATIONS.

(1) BESIDES what is so forcibly observed by Lord *Hardwicke*, p. 111, it was held, in *Bailey v. Bailey*, 11 *Ves.* 151, to be quite settled, that a defendant, until a fourth insufficient answer, is entitled to be discharged from custody, on putting in a further [answer and tendering the contempt,] without waiting the report upon the exceptions, although the costs have not been accepted. Same as to examinations. See *Bonus v. Flack*, 18 *Ves.* 287.

TAYLOR *versus* LEWIS, Dec. 20, 1750.

NOTES AND OBSERVATIONS.

VOL. II. page 111.—As to rights and remedies of six clerks, and clerks in Court, for their fees. Their lien on papers, &c. Whether six clerk can stop proceedings until paid his fees which had been paid to the clerk in Court of his division, who had absconded.(1)

Clerk in Court cannot be changed at the mere will of a party.(2)

It was held in *Farewell v. Coker*, 2 *P. W.* 460, that where a country client employed a solicitor, who employed a clerk in Court, and the client in the country paid his solicitor, who suffered the clerk in Court to remain unpaid; the client was not bound to pay the latter: but still, that if the clerk in Court had any papers in his hands, he might retain them. See also, on other points, the anonymous case, 2 *Ves.* 25; *Stevens v. Avery*, 1 *Dick.* 224; and *Anon.* 2 *Dick.* 102, with the cases there mentioned.

(1) As to the establishment of the clerks in [291] Court, and the regulations between them and the six clerks, as now existing, see 3 *Ves.* 589, &c.

(2) Vide *Twort v. Dayrell*, 13 *Ves.* 195, and the cases there cited.

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MARASCO *versus* BOITON, Dec. 19, 1750.

VOL. II. page 112.—After appearance, no special injunction (such as to stay the navigating of a ship,) without notice.

BISHOP *versus* WILLIS, Dec. 19, 1750.

VOL. II. page 113.—Orders made upon petitions are not discharged on motion.

ANONYMOUS, December 20, 1750.

VOL. II. page 113.—No jurisdiction in the Court to deal with any property given over in default of issue upon any probability whatever of their being no issue.

Bills in Parliament on such grounds often refused.

Ex parte WYLDMAN, December 20, 1750.

VOL. II. page 113.—S. C. 1 Atk. 109—Bankrupt.—One of two debtors becomes a bankrupt, and the creditor proves his whole debt under the commission, but no dividend made. That creditor, though he receive a composition from the other debtor, may still receive a dividend upon his whole debt as proved, till he obtain 20s. in the pound. It would have been otherwise if he had received a dividend before the bankruptcy. As to the equity of sureties who have paid the demand of a creditor who has proved, or is entitled so to prove under a commission; and their present remedies by stat. 49 Geo. III. c. 121, § 8.

NOTES AND OBSERVATIONS.

A CREDITOR having securities of third persons, to a greater amount than the debt, may prove and receive dividends upon the full amount of the securities, [292] to the extent of twenty shillings in the pound upon the actual debt. *Ex parte Bloxham*, 6 Ves. 449 and 600.

Note, however, a distinction made between that case and *ex parte Leers*, in the same vol. p. 644, in which it

was (unwillingly) held, that dividends, declared upon a bill of exchange, though not received, must be deducted from the proof by the indorsee, under another commission of bankruptcy.

It should be observed, that Lord *Eldon*, C. in making this order, said, the principle of the practice stated, and upon which he thought the order warranted, was very doubtful. See p. 646. And note further, that the holder of a bill of exchange [having received payment] might be compelled to prove under the bankruptcy of the acceptor, for the benefit of the drawer. See per Lord *Eldon*, C. 6 *Vesey*, 734.

And a surety, depositing the money and indemnifying against expense, &c. might compel the creditor to go against the principal debtor, and even to prove under a commission of bankrupt for his, the surety's, benefit. Ibid.

The statute 49 Geo. III. chap. 121, section 8, has since vested the proof made by a creditor, who has been paid by a surety in such surety, and vested in the surety a right to prove *per se* where no proof has been made by such creditor.

The equity of the surety cannot, however, operate in any degree to the prejudice of the original creditor. See *ex parte Rushforth*, 10 *Ves.* 409; and *Payley v. Field*, 12 *Ves.* 435.

Ex parte Bennett, cited page 114, is in 2 [293] *Atk.* 527; *Cooper v. Pepys*, cited *ibid.* is in 1 *Atk.* 106.

DUKE of BEDFORD *versus* COKE, Jan. 14, 1750-1.

VOL. II. page 116.—Vide S. C. 1 Dick. 178, as to a question of interest on arrears of annuity and simple contract debts.

On forfeiture of an estate, the crown or its grantee takes it *cum onere*; that is, subject to all charges fairly binding the party

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with reference to it, although voluntary; but not subject to debts at large. The crown in such case has the same equity to be relieved against conveyance on the ground of fraud, &c. &c. as the party would have. No interest given on arrears of a voluntary annuity. Nor without a very special case,(1) on arrears of annuities in general,(2) or arrears of maintenance, simple contract debts, &c.(2)

NOTES AND OBSERVATIONS.

(1) VIDE *Bickham v. Cross*, 2 *Ves.* 471, *et postea* ().

(2) In the year 1743, interest had been refused to be given in this very cause, on the arrears of another annuity, under much harder circumstances. The plaintiffs were simple contract creditors. The Duchess of *Wharton* was entitled to a jointure of 1200*l.* *per annum*, and the Master's report had stated the arrears of it to amount to 22,000*l.* The Duchess, being in great distress by this, applied for a computation of interest, stating specially, that she had been obliged to borrow money for her support. The Court was, however, under the necessity of refusing the application, notwithstanding the estate had turned out amply productive from the discovery of mines. Lord *Hardwicke* expressed himself to this effect:—"The question is, whether this liquidated sum is to carry interest. This is a hard case, and I would come at it if I could. If interest has been reserved by the decree, where there is no legal remedy, the Court may give it in their [294] discretion. One question is as to the rule of the Court, whether she is entitled; secondly, as to the discretion of the Court. As to the first, she is not entitled by the rule of the Court; for, at law, where there is no penalty, no interest is given: where there is a penalty, you may levy for the whole. If you bring an action of debt, interest may be recovered by that new action. If she is not entitled by the rule of law, how is it in this Court? In this Court, if there is delay of payment upon a decree, I do not know that the plaintiff can pray interest.

Upon mortgages, the Master computes it from the confirmation of the report; but I do not recollect an instance where the Court has gone the length now prayed." It appears, that as it was a hard case, the Lord Chancellor directed a search for precedents; but that nothing being found, he could not make the order. See per Lord *Loughborough*, C. 2 *Ves.* jun. 166-7. Et vide *S. C.* 1 *Dick.* 178. See 2 *Ves.* jun. 163. But see 2 *Dick.* 643.

The Master of the Rolls says (1 *Ves.* 170,) that the question of interest, as to arrears of annuity, is in some degree discretionary. It is apprehended this must be taken with reference to what is said by Lord *Hardwicke* above in this note. See *Creuze v. Hunter*, 2 *Ves.* jun. 157. Vide, nevertheless, 2 *Dick.* 644.

Many endeavours have been used to obtain interest upon the amount of simple contract debts, ascertained by a Master's report; but it seems the Court will never allow it in any case merely of this nature. See *Creuze v. Hunter*, 2 *Ves.* jun. 157, and Mr. *Vesey's* note, 169.

And it should be observed, that although *Bickham v. Cross*, 1 *Ves.* 471, 472, (*et postea*, with the note,) may, on a hasty view, seem contra, Lord *Hardwicke*, nevertheless, decided it consistently with the above principles. See per Lord *Loughborough*, C. 2 *Ves.* jun. 160, 166.

Interest will not be given on arrears of maintenance, 14 *Ves.* 516.

EXEL *versus* WALLACE, January 28, 1750-1,
and January 22, 1751.

(*Reg. Lib.* 1750. *A.* fol. 217.—and *Reg. Lib.* 1750. *A.* fol. 492.)

VOL. II. page 117.—Rolls. Sir John Strange, M. R. See this case on appeal from the second point, 2 *Ves.* 318, &c. when the decree was affirmed.

First point.—Bequest of residue of personal estate after a life interest to the use of all and every the children of testator's daughter equally; to be transferred, delivered, and paid(1) to them severally, when by law able to receive and give discharges. Held to be vested in each child on coming into being, and transmissible; though subject to be varied by the birth of others.

Second point.—Trust of the residue of a term with a double aspect, viz. settlement on marriage by deed of a leasehold estate(2) in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, with the rents and profits, to the eldest son; “and for want of such issue of such son,” to daughters.

A son having been born, who died without issue in the life of the mother, held that it did not vest in him, but was a good remainder to an only daughter at the death of the surviving parent.

The decree in this point affirmed on appeal 2 Ves. 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred.

NOTES AND OBSERVATIONS.

(1) SEE 1 *Roper on Legacies*, 151, &c. 177, 178, &c.

(2) See page 325. As to this leasehold estate, it is to be particularly observed, that it belonged to *Andrew Smith*, the maternal grandfather. Vide *Reg. Lib.*; et per Lord *Hardwicke*, 2 Ves. 322 and 324.

This is the more specially to be pointed out, with the above references to support it; since it evidences the Report to be wrong in two places; namely, at the bottom of page 120, and towards the top of page 325, where it makes the argument to infer, that the estate in question proceeded from the husband, and not the wife's father. The word “again,” therefore, in the first instance, and the word “back,” in the latter, should be omitted.

[296] *Seymour v. Bingham*, cited p. 120, is *Seamer v. Bingham*, 3 *Atk.* 54; et vide *Bennett v. Seymour*, *Ambler*, 521.

Lord Beauclerk v. Miss Dormer, cited p. 121, is in 2 *Atk.* 308, which Lord *Thurlow*, C. said is well reported. See 1 *Bro.* 190.

DUKE OF BRIDGEWATER *versus* EGERTON,

January 29, 1750-1.

(*Reg. Lib.* 1750. *A. fol.* 606, entered “*D. of B. v. Lyttleton.*”)

VOL. II. page 121.—Books not heir-looms ; (1) and if limited to go with intailed lands, they become the property of the first tenant in tail. (2)

Younger son becoming an eldest, entitled to take *eo nomine*. (3) Devise of house and appurtenances to wife during widowhood ; but that the eldest son when 21, or married, might have it, on notice.—The wife having married after the death of a former eldest son, unmarried, (3) and during the minority, &c. of the existing eldest son ; it was declared that he would be entitled to the enjoyment on attaining 21, or marriage, upon giving notice. The intervening interest in the premises and appurtenances, being undisposed of, held to fall into the residue of the real and personal estates respectively.

Portions, satisfaction of. (4)

NOTES AND OBSERVATIONS.

(1) *Levison v. Gower*, cited at the beginning of the Report, is in *Barn. Rep. Ch.* 54 ; and is mentioned 1 *Ves.* 202. As to points on heir-looms, vide *Trafford v. Trafford*, 3 *Atk.* 347 ; *Wyth v. Blackman*, 1 *Ves.* 196, 202, *et antea* (110;) *Boon v. Cornforth*, 2 *Ves.* 277.

(2) Vide *Co. of Lincoln v. D. of Newcastle*, 12 *Ves.* 218.

(3) The eldest son of the marriage had died [297] under 21, unmarried. It was accordingly declared, “that the said *J. Duke of B.* dying under the age of 21, and unmarried ; and the plaintiff being now the eldest son of, &c. for the time being, will, when he shall attain his age of 21 years, or be married ; and, on giving

notice of his desire for that purpose, be entitled, &c." *Reg. Lib.*

(4) See the *Rep.* p. 123.

EARL OF CHESTERFIELD *versus* JANSSEN,

February 4, 1750-1.

VOL. II. page 125.—S. C. 3 Atk. 301. Post obit security. Confirmation, &c.(1)

A. aged 30, borrows 5000*l.* on bond to pay 10,000*l.* if he survives B. aged 78. A. survives a year and eight months, having on death of B. confirmed(1) the bargain by a new bond, &c. freely; and paying part.

No relief given in this case, except as to the penalty.(2)

NOTES AND OBSERVATIONS.

(1) As to subsequent transactions, not amounting to confirmation, see in *Wood v. Downes*, 18 *Ves.* 120, &c.

(2) See also *Hill v. Caillorel*, 1 *Ves.* 122; *Henley v. Aze*, 2 *Bro.* 17; and *Whartons v. May*, 5 *Ves.* 271 (affirmed on appeal, *Dom. Proc.* 1808.) But notwithstanding the favourable nature of some of these cases, the Courts of Equity, with a most salutary regard for the protection of the public, have always refused to lay down any general rule, marking the bounds of such bargains for
[298] expectancies, as might be considered fair, or otherwise. See 2 *Ves.* 144, 149, 155, and 158.

They will therefore subject every instance of the nature brought before them, where there is alleged to have been the least degree of distress, inexperience, or ignorance on the side of the contracting party, to the most severe scrutiny. See the last mentioned references, and 2 *Ves.* 151, bottom. It is observable, that the instances in which *post obit* securities have been sustained in Courts of Equity are very few, and have been even more so of late years; as also that the very term is "*nomen odiosum*," and suspicious of fraud. It seems, indeed, that the parties who are

induced to engage in taking such securities, however innocently, or however even kind they may have been, in extricating a friend from his embarrassments by means of the transaction, will yet not at all be authorized in complaining of the delay; which (arising from the inquiries) keeps them out of their money; or most probably receiving no more eventually than the amount of the money advanced, with interest. As to the delay, it may be sufficient to reflect, that since public utility has made our Courts of Justice affix a stigma to these transactions, the notoriety of it should have operated by way of caution; whilst a just ground of suspicion must be attended with all the consequences of strict investigation.

The author, by way of illustrating the latter observations, has annexed an accurate report from his own notes, and from the pleadings, &c. of the case of *Evans v. Cheshire*, in which he was concerned, and which came on before Lord *Eldon*, C. on a motion to [299] dissolve an injunction, November 28, 1803; January 28, 1804; and December 7, 1804: and was afterwards heard, and ultimately determined, by Sir *William Grant*, M. R. for the Lord Chancellor, February 21, and March 21, 1806. It is inserted immediately next to this case. For the general principles on these subjects, see in the above important and thoroughly considered case of *Lord Chesterfield v. Janssen*, 2 *Ves.* 144-5, 148-9, and 155, &c. &c.; and in the cases cited on the argument, particularly *Curwyn v. Milner*, 3 *P. W.* 292, note; which Lord *Thurlow* says was perfectly free from fraud (see 1 *Brown* 9;) and which therefore seems a strong case: and also *Gwynne v. Heaton*, 1 *Bro. &c. &c.* Vide also the cases referred to in *Wharton v. May*, 5 *Ves.* 45, &c. &c. Vide also *Bowes v. Heaps*, 3 *Ves. & Beames*, 117, &c.; with the case of *Gowland v. De Faria*, 17 *Ves.* 20; and *Peacock v. Evans*, 16 *Ves.* 512.

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Lawley v. Hooper, cited p. 129, is in 3 *Atk.* 278.
Shepley v. Woodcock, cited p. 130, is in 2 *Atk.* 535.

As to what is observed towards the top of p. 149, as to the proposition coming from the borrower Mr. *Spencer*, and not from the defendant who advanced the money, Lord *Eldon*, C. said in *Evans v. Chesshire*, (reported in the next page) "that the first proposition seeming to come from the borrower, in most of the cases, as it did (he believed fairly) in the one before him, was of no possible weight in his Lordship's mind; since he had always observed, in his long experience, that artful men [300] took particular care to let the first mention of any distinct proposal of the kind thus originate." See the case of *Townsend v. Lowfield*, (1 *Ves.* 35) from *Reg. Lib. antea*, p. 31; where the defendant stated the proposal originated with the borrower; and from whence the note refers to the Lord Chancellor's observation as above.

EVANS *versus* CHESSHIRE.

Rolls.—Post obit transactions.

In Chancery, November 28, 1803; January 28, 1804;
December 7, 1804; February 21, and March 21,
1806.

THE bill was filed on behalf of *Charles Evans*, Esq. unto whom certain estates had descended, subject (as real assets) to the claims of the defendant, as obligee in the *post obit* bond in question, upon the death of his brother *William Evans*, the obligor, who had formerly been a captain in the Anglesey Militia. It was framed with the usual allegations, as applied to the circumstances; and prayed that the bond might be declared fraudulent and void, that it might be delivered up to be cancelled; and for an injunction in the meanwhile.

The defendant, Mr. *Chesshire*, had long been an officer

in his Majesty's service, and was a captain in the army immediately previous to the loan and execution of the bond. This instrument being in consideration of an advance of 300*l.* was conditioned for the payment of 600*l.* upon the event of *William Evans* surviving his father; but was in any other case to be void. *William* [301] *Evans* survived his father by the space of about six months only, and had never disputed the fairness of the transaction. He, however, being dead, and the plaintiff, his brother and heir, refusing to pay the amount of the condition, thus become absolute, Mr. *Cheshire* was under the necessity of bringing an action for it; which being in a course of trial for the Summer Assizes in 1803, the suit was instituted, and the common injunction obtained for want of an answer. A full answer being put in, the matter was brought on, for the first time, on the last day of Michaelmas Term, 1803, upon a motion to dissolve the injunction on the merits disclosed by the answer; when the facts, as then stated on the record, appeared, in substance, to be these:—That the deceased obligor, having led an extravagant and dissipated life, and being in prison for debt at Winchester, but being entitled in remainder expectant, on the death of his father, to an estate of considerable value in Wales, became acquainted with the defendant about three or four weeks before the execution of the bond in question; and about ten days after their first acquaintance, informed the defendant, that, before their having first met, he had been negotiating a loan of 900*l.* with some persons in London, whose terms were most obviously exorbitant; upon which occasion *W. E.* said, that considering the price of stocks was then low, &c. he should not have thought a proposal for him to pay double for money to be then advanced, in the event of his surviving his father, would have been unreasonable. That upon this occasion, nothing whatever occurred as to the defen- [302]
dant lending *W. E.* any money; nor had he the

least idea of it. That soon after this, *W. E.* very earnestly requested the defendant to lend him sufficient money to enable him to be extricated from prison, and to return to and procure the assistance of his father; and the more effectually to induce him to do so, informed the defendant, that in such case the Lord Lieutenant would re-instate him in his former command in the militia; assuring the defendant that he would endeavour, and should be likely to prevail upon his father to let the defendant a farm in Wales (whither defendant wished to retire with his family) at a reasonable rent. That a Mr. *Heron*, who was a mutual acquaintance of each, but more particularly acquainted with *W. E.* interfered on behalf of the latter for the above purposes, representing to the defendant, that if he refused, *W. E.* would have recourse to usurers, after which, it was most likely, that instead of returning to his father's house, he would dissipate what should remain, or he could procure afterwards in London, amidst his former excesses; whereas, if the defendant assisted him, there was every fair prospect of the contrary, and of his future good conduct; so that he would thereby regain his influence with his father, and might be enabled to repay the loan, and return the kind obligation by procuring the defendant a farm, as above mentioned. The answer stated also, that although the defendant was for a long time unwilling to lend so much money, he was at length prevailed

on, by the above inducements, and a solemn promise from *W. E.* that he would reside with his father, to lend him a sum of 600*l.*; half of which sum alone was lent upon the *post obit* bond in question, the remainder being lent in consideration of an annuity [which was never made, by the pleadings, a subject of the suit.] The bond was executed on the 15th of July, 1799, and the consideration was paid in the presence of Mr. *Evans's* attorney and of another person also, under the immediate approbation of Mr. *Heron*. The defendant

stated his positive belief, that the 300*l.* thus paid was (under the circumstances) a full and adequate consideration; especially considering *W. E.*'s formerly dissipated life, and his long confinement in prison, *viz.* about five years: and said, that the above transaction was the only instance in which he had lent his money on any such kind of security, &c. &c.

He then stated, that at or about the time of the bond's execution, *W. E.* told him his father was upwards of 70, and was of a strong constitution: but the defendant averred, he had since been informed, and believed, that the father was then about 74. That at the above time *W. E.* gave defendant to believe, he himself was then aged 38; whereas, in fact, he was then about 36. He said, that considering all circumstances, he then thought the chances of survivorship were, at least, upon an equality; and he submitted, that the same was in some measure proved by the event, the son not having survived the father six months. The defendant stated, that *W. E.* having, through defendant's kind assistance, procured his release from prison, and returned to his father, wrote, about a month afterwards, desiring defendant to betake [304] himself and family into Wales, as there was a house in his father's neighbourhood ready for his reception. The defendant accordingly complied, and purchased furniture, &c. to a large amount, which, from *W. E.*'s failure in making good his assurances, he was obliged to re-sell at a great loss. He averred he was credibly informed, after his arrival at *Caernarvon*, that the father was believed to be a better life than *W. E.* as he was in good health, of a strong constitution, and lived regularly; whereas *W. E.* was in every respect the contrary; and that as most persons thought the father was likely to live 15 or 20 years, he, the defendant, had made a bad bargain; insomuch, that nobody who understood such matters would have done the same: and the defendant said, that

being in consequence very apprehensive, he offered *W. E.* and other persons, the liberty of re-purchasing the security at less than the sum he had lent; but that such offers were declined. The defendant also informed *William Evans's* father of the whole transaction and circumstances by letter, but without effect. The father died on the 15th of September, 1802, and *William Evans* on the 6th of April, 1803, which was less than six months afterwards.

The defendant therefore submitted, that under the above circumstances, the Court ought not to interpose against his security.

The cause coming on, for the first time, upon the motion to dissolve the injunction, as above stated, arguments, founded on the above facts, were relied on by [305] the defendant's counsel as evidencing him to have acted on motives, not only fair, but altogether friendly. That both the parties were military men; and that a brother officer was the last person in the world who could be looked upon as a usurer: that besides the absence, and almost absurdity, of such a presumption, there was every reason for implying every motive of benevolence; and particularly from the effect which had ensued, in *W. E.* having, through Captain *Chesshire's* kind assistance, been restored out of a long, and almost hopeless captivity, to the bosom of his family, wherein he had lived in ease for the remainder of his life. That *W. E.* having been thus benefitted, and never disputing the justice of the defendant's claim, even after the condition had become absolute; and more especially having declined a direct offer of re-purchasing the security before that event, at even a less sum than he had received; together with the circumstance of the same offer having been made to the father; it was too much for the Court to set it aside at the instance of the plaintiff.

Lord *Eldon*, Chancellor, however, with his usual anxie-

ty for justice, observed, that the situation of a borrower of money, under such circumstances, that is to say, the obligor's having been in prison for a space of five years, and being confined there when the transaction took place, was truly pitiable; and that the more particularly, as he was at a distance from his relations, and had no kind of property whatever in possession. His Lordship then said, it had been alleged by the bill, and insisted on by the counsel for the plaintiff, that Mr. *Evans's* expectancies consisted in a vested remainder after his [306] father's life estate, and that this part of the argument had been founded on a supposed distinction between such expectancies as were certain to take place in possession some time or other, and such as were merely contingent; whereas his Lordship did not think there was any necessity for that; and was not aware of any case which proceeded on any such kind of distinction. Each instance would be strictly scrutinized in either case; and it was undoubtedly clear, that the Court of Chancery looks with a most jealous eye upon every contract with a person in distress; and that it is particularly vigilant when the parties are bartering in respect of property which is not in possession. His Lordship then observed, that the argument, founded on the original application for a loan upon a security of such a nature, appearing to come from the obligor, and not from the defendant, did not weigh much with him; since, in his long experience in Courts of Justice, he had always taken notice, that the lenders of money always took great care that the first proposition should be detailed as coming from the borrower, or distressed man. His Lordship said he would not enter into calculations of the value of the sum, which, according to the tables of the annuity offices, ought to be secured under such a risk for the advance of 300*l*. The bill stated it at 450*l*.; and Mr. *Owen*, for the plaintiff, suggested it in his argument at about 416*l*. Neither would he much dwell upon the de-

fendant having taken it at 600*l.* or double the sum advanced. But his Lordship said, he should take up
 [307] the case on that broad general principle which the Court had always acted on; namely, that it will watch, with a most jealous eye, and will scrutinize with the utmost severity of attention, every circumstance in each case brought before it, where it appears that a party has been dealing with a distressed person for his expectancies: and that as he thought there was enough of that principle in the case before him, he would maintain the injunction until the hearing.

Some short time after this, the defendant tendered an issue at law to the plaintiff upon the fairness of the transaction; and (though the plaintiff could not in strictness be compelled to accept it) thereby showed his readiness to have it thoroughly scrutinized by every means of evidence in a Court of Law. The plaintiff, nevertheless, refused the offer, and the Lord Chancellor observed, that the Courts of Law were, in his opinion, inadequate to the complete investigation of matters of this nature. His Lordship directed judgment to be given in the action, and a release of error.

Some time after this, the plaintiff amended his bill, and introduced some charges relative to *William Evans's* life having been insured; which gave Mr. *Chesshire* also the opportunity of explaining some matters by his answer to the amended bill, even rather more circumstantially than he had done before.

He stated in this, that his regiment being quartered at Winchester in May, 1799, he was in the following month arrested, and became a prisoner for debt in Win-
 [308] chester Gaol, where his acquaintance commenced with the plaintiff's deceased brother, who was in a like situation. That his feelings being conse-

quently hurt,* he was determined to extricate himself, and discharge his debts by the sale of his commission, and intended to live upon the surplus, with his family, in retirement. He sold his commission accordingly, the knowledge of which induced *William Evans* to request a loan, under the circumstances he had before stated.

The bond was executed in the subsequent month of July, when they were each of them prisoners for debt. He denied, as he had done before, every charge of fraud, undue conduct, or unfair intention; and he stated all that had taken place relative to insurances, either on the *post obit* bond, or on the annuity, in the same manner as it afterwards appeared verified by the Master's report [see *post.*] He averred his belief, that it was the sincere intention of *William Evans* to have satisfied the full amount of 600*l.* due upon the bond, without any kind of litigation; and that he would have done so had he lived, and would by no means have traduced and harassed the defendant as the plaintiff had done.

He submitted, therefore, upon the whole, that inasmuch as the original transaction was not only totally free from fraud or suspicion, but was in- [309] tended, and had the effect of liberating *W. E.* from prison, and restoring him to his friends; inasmuch also as it was in his life-time made known by the defendant to his father and other friends, who had an offer of re-purchasing the security, at even less than the original advance of 300*l.*; and as *W. E.* survived his father by a space of less than six months only, which proved the

* These circumstances were not stated in the answer to the original bill, or even intimated to the counsel who prepared it, owing to the natural repugnance felt by a gentleman of the army to publish his having been under an imprisonment for debt. In point of fact, however, these circumstances are the farthest from derogating from the defendant's character; and indeed tend to elucidate the fairness of his conduct in the above transaction very particularly.

chances equal, he, the defendant, had been already more than justly aggrieved by the plaintiff; and that notwithstanding the unfavourable nature of the security he had, inadvertently, been induced to take, he ought to be permitted to recover the amount of the condition, or the sum of 600*l.* and the interest accrued thereon from the delay; and that the bill ought to be dismissed with costs.

Another motion to dissolve the injunction was made on the 7th of December, 1804, upon this state of the pleadings; but the Lord Chancellor refused it, saying he considered the advance of the money on this bond, and of a like sum in consideration of the annuity, as being in fact, one transaction, since the advances were made at the same time. His Lordship wanted also to be satisfied as to what insurances had been made, and what monies, if any, the defendant had received on account of insurances: and he therefore directed inquiries as to these matters, both in respect of the *post obit* bond, and of the annuity.

The Master, accordingly, by his report, dated the 30th November, 1805, after stating that the consi-
 [310] deration money for the *post obit* bond, and that for the annuity, were included in the same draft or cheque, which was duly honoured and paid; and some annuity payments; certified, that an insurance was effected on the 30th of July, 1799; and that a premium of 14*l.* 3*s.* 6*d.* was paid for it, equally between *W. E.* and the defendant, of which premium one moiety alone was all that had relation to the *post obit* bond, the remainder being relative to the annuity.

The Master reported, that fifteen months having elapsed from the expiration of that insurance, without any other having been made; and *William Evans* having in the interim broken a large blood-vessel, the latter was at length induced to concur in effecting another insurance on his life for one year; which insurance was made on the 18th of November, 1801, and was of the like nature with the

former, except that the defendant did not pay any part of the premium, though he at first expected to have done so; *W. E.* having, of his own accord, proposed to pay, and having, in fact, paid the whole of such premium, by way of recompensing the defendant for the risk he had run, as above mentioned. That these two insurances expired in *W. E.*'s life-time; and that no further insurance was made in respect of the *post obit* bond, by reason of the death of *W. E.*'s father; and that the defendant had never received any thing in respect of any insurance there-upon.

That an insurance was made, in respect of the annuity, by the defendant, at his own expense; and *W. E.* having died whilst it subsisted, the defendant received the amount from the office.

The cause came on, upon the Master's Report, [311] on the 20th of February, 1806, before the Master of the Rolls, sitting for the Lord Chancellor, when the case of *Lord Chesterfield v. Janssen*, was, amongst other things, relied on for the defendant; and it was contended, that the offer of re-purchase made to *W. E.* and his father, &c. amounted to full as strong a confirmation as appeared in that case. His Honour, however, giving judgment on the 21st of March, declared it was impossible for the defendant to be permitted to sustain his claim to the amount of 600*l.* merely upon the *post obit* bond, since the only ground which takes such instances out of the application of the statutes against usury, is the risk of the principal lent; whereas, in the present case, the defendant would, for a part of the time, be indemnified by an insurance, of which the obligor bore half the expense; and, in the latter instance, was entirely free from risk at the obligor's sole expense.

His Honour said, it seemed to him to have been a part of the original agreement or understanding of the parties, that *W. E.* should insure his own life; since the Report re-

ferred to what might imply the idea, where it stated the defendant's supposed injury by way of risk on account of *W. E.*'s life having remained uninsured for a space of fifteen months. That this certainly ought not to have been the case, and *W. E.* ought not to have had any such obligation fixed on him as to the *post obit* transaction; and that the risk to be run, was the sole cause of the great [312] difference in such matters between the sum advanced and the sum stipulated in a certain event to be received.

His Honour, however, added, it was contended on behalf of the defendant; and he agreed to it, that the whole transaction of the advance of the money on the 15th of July, 1799, both on the *post obit* bond, and on the annuity, must be taken together, and viewed in the same light; and, consequently, if the plaintiff sought to undo the first transaction, he must do so upon the terms of accounting for what was advanced for the annuity, with a deduction of the payments made in respect of it, and of the money paid for insurance.

As to the plaintiff's argument that the defendant had received the amount of the money he had advanced on the annuity from the insurance office, the plaintiff had nothing to do with that: it might perhaps be a question with the insurance office, whether the defendant should not be a trustee in respect of what he should thus recover, after having received the amount under his insurance (though that would be very doubtful, and he knew no case of the sort;) but the plaintiff had no interest in this, and ought only to be relieved against the *post obit* bond, upon the terms of the Court's taking into consideration the 600*l.* advanced on the two several securities.

The Court therefore declared, that the *post obit* bond, and annuity bonds, given by *W. E.* &c. ought to be considered only as a security for the sum of 600*l.* actually lent and advanced by the defendant to the said *W. E.*; and de-

creed the same accordingly. And the Master was to compute interest on the money so actually advanced, &c. after the rate of 5*l.* per cent. [313] from the time of its advancement. In the taking of which accounts credit was to be given to the plaintiff for all sums of money paid by *W. E.* for insurance on his life, or otherwise, on account of the said bonds, or either of them. And upon the plaintiff's paying what should be found due on the balance of such account, the bonds were to be delivered up to the plaintiff, &c. &c. And the injunction was to be continued until after the Master's Report, or further order, in case either of the parties should think fit to apply. The Court gave no costs on either side, and each party was to be at liberty to apply, &c.

PRIEST *versus* PARROT, Feb. 8, 1750-1.

(*Reg. Lib.* 1750. *B. fol.* 230.)

VOL. II. page 160.—Grant ex turpi causa.

Bill for payment of a sum of money and an annuity secured by a deed poll(1) by a young woman who had been seduced by a married man,(2) in whose family she lived as companion to his wife, and who, by continuing to live with him occasioned a separation, dismissed; but without costs, on account of her previous good character.

NOTES AND OBSERVATIONS.

(1) THE marginal note in the Report expresses a doubt whether the provision was secured by "bond" or "grant." Though the entry in *R. L.* is very short, being that merely of a dismissal of the bill, it appears from thence that a deed poll of the 14th April, 1735, is entered as read in evidence, besides the other proofs in the cause. The strong probability of its being the instrument on which the bill was founded, is confirmed by the author's reference to the *Registrar's Minute Book* of the day, which states the deed to have been read for the plaintiff; after which

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there is an entry of evidence read in favour of her character.

(2) See [3 *P. W.* 339, 2 *P. W.* 432; *Gilb. Rep.* 9. *Forr.* 153, 3 *Burr.* 1568.] *Franco v. Bolton*, 3 *Ves.* 368, &c. where several of the cases are collected. *Gray v. Mathias*, 5 *Ves.* 286. Et vide *Clarke v. Periam*, 2 *Atk.* 333.

ANDREW *versus* CLARK, Feb. 9, 1750-1.

VOL. II. page 162.—Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue.(1)

Legacy does exclude executors in general; though not universally.(2)

NOTES AND OBSERVATIONS.

(1) SEE *Farrington v. Knightly*, 1 *P. W.* 544, also in *Bishop of Cloyne v. Young*, 1 *Ves.* 91. 96, 97. *per* Lord *Hardwicke*, 2 *Ves.* 496. *Seley v. Wood*, 10 *Ves.* 71; and *per* Lord *Eldon*, C. in *Griffith v. Hamilton*, 12 *Ves.* 310.

As to the rights of executors, *et e contra*, see *Blinkhorn v. Feast*, 2 *Ves.* 27. *B. of Cloyne v. Young*, *ibid.* 91. *Wilson v. Ivat*, *ibid.* 166, and *post.* 317; with the notes *antea* respectively.

(2) *Blinkhorn v. Feast*, 2 *Ves.* 27, *et antea* 262.

DUHAMEL *versus* ARDOVIN, February 11, 1750-1.

(*Reg. Lib.* 1750. *A. fol.* 196.)

VOL. II. page 162.—Testator reciting his intention to dispose of all his property, and that his daughter was likely to die [of a violent distemper,] left his wife, if she did die, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower; giving the residue and dividends to that daughter. If she died without children, testator gave his brother "all that should be left." The daughter survived the testator, but died of the same illness, without issue.—Held that the mother was still entitled for life; and that the words "what should be left," constituted a good residuary bequest to the brother.(2) Costs.

NOTES AND OBSERVATIONS.

(1) LORD *Hardwicke* is decisively clear in the judgment as to the testator's intention to increase his wife's income in case of the very probable event happening after the period of his own death, and during her own lifetime without issue. [315]

The peculiarity, therefore, of this case, frees it from the difficulties which existed in *Cambridge v. Rous*, 8 *Ves.* 12, 21, &c. and in the cases therein referred to.

(2) The bill of the daughter's husband, as her administrator was therefore dismissed; but without costs.

BYAS *versus* BYAS, Feb. 15, 1750-1.

(*Reg. Lib.* 1750. *A. fol.* 353.)

VOL. II. page 164.—Copyholds.—Testator seized of freehold, and of copyhold estates unsundered, "gives all the rest, &c. of his estate, real and personal, to his wife, her heirs," &c. Held clearly, that the copyholds thus unsundered did not pass in equity, there being nothing to designate such express intention; and sufficient to answer the words used of "real estate" without them. (1) It would have been otherwise in this case, if testator had not had any freehold estate, (2) or having both, had expressly devised both, even although the copyhold was unsundered. (3) In cases where copyholds are clearly meant to pass, but are unsundered, the want of such surrender supplied only in three cases, *viz.* for the benefit of a wife, (4) children, (5) and creditors. (6) Distinction between the supply of a surrender in favour of wife or children and creditors.

NOTES AND OBSERVATIONS.

(1) *VIDE Judd v. Pratt*, at the Rolls, 13 *Ves.* 168, 178. Affirmed on appeal by Lord *Eldon*, C. 15 *Ves.* 399. See also Mr. *Scriven's* lately published, and very useful work on Copyholds, pages 161, 162, &c.

(2) *Vide Church v. Mundy*, on the appeal before Lord *Eldon*, C. 15 *Ves.* 396, 404, &c.

(3) As to where there has been a surrender, see *Good-*

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wyn v. Goodwyn, 1 *Ves.* 226. As to where not,
 [316] see *Scriven on Copyholds*, 166, and several of
 the cases collected *ibid.* 134, 5, 6, which are
 referred to by the subsequent notes.

(4) See many of the principal cases collected in *Scriven on Copyholds*, 134.

(5) See most of the material cases collected in *Scriven on Copyholds*, 134, 5.

(6) See a variety of the cases collected in *Scriven on Copyholds*, 135, 6. Et vide *ibid.* 162, 3, as to the distinction made in favour of creditors; and the late cases which have gone much further than Lord *Hardwicke* in *Ithell v. Bean*, 1 *Ves.* 215, *antea*, 114.

It was observed as to the principal case of *Byas v. Byas*, by the Master of the Rolls in *Judd v. Pratt*, 13 *Ves.* 178, that "the heir might have been called upon to make his election; though it seems never to have occurred to any one to put the case on that ground."

The case of *Judd v. Pratt*, as to its material features of the devise, and of there being freehold as well as copyhold lands, can hardly be distinguished from the principal one, see 13 *Ves.* 168, 178. And Lord *Eldon*, C. upon the appeal of it, says, that "*Byas v. Byas*, was a strong authority." His Lordship also adds, it was relied on by Lord *Thurlow*, C. in *Lindopp v. Eborall*, 3 *Bro.* 188. Vide in *Judd v. Pratt*, on the appeal, 15 *Ves.* 394.

With regard to what is said in the judgment of the principal case towards the bottom of page 165, in answer to the argument, attempting to resemble the devise to creditors; it may be also observed (*inter alia*) that
 [317] the doctrine of election is not applicable to creditors, see *Kidney v. Coussmaker, &c.* 12 *Ves.* 136.

Though, in the principal case, the bill was dismissed, it was without costs. *Reg. Lib.*

WILSON *versus* IVAT, Feb. 16, 1750.

(Reg. Lib. 1750. B. fol. 495.)

VOL. II. page 166.—Sir J. Strange, M. R. Testator having appointed his wife and the defendant executors, and given his wife certain specific articles,(1) and his wife having died in his lifetime, the defendant held entitled to the whole residue, comprising those articles as lapsed;(2) and the bill of the next of kin was dismissed; but without costs. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personalty. Sir J. Strange, M. R. held that executor, as such, takes all such as is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shown; calling him a “legal residuary legatee.”

Distinction between the executor, as such, taking lapsed residue, and a lapsed legacy—Held, that he does not take the former—As to the latter, *quære*.

Executor not excluded from the residue by a real estate given to his wife.(3)

NOTES AND OBSERVATIONS.

(1) The report is incorrect in stating the wife to be “residuary legatee.” The testator only gave her “all his household goods, stock of cattle, monies, and securities for money, whatsoever, and wheresoever.”

The defendant, “in regard he was the surviving executor, &c. and had no specific legacy, or any thing else whatsoever, given him by the testator’s will, as a recompense or satisfaction for his trouble in respect of the executorship, submitted, whether the surplus and residue, or such other part of the testator’s personal estate, of what kind or nature soever, as was not comprised or included under the aforesaid denominations specifically mentioned in the will, ought to be distributed amongst the next of kin, &c. or not; and whether the testator did not intend that he should have a beneficial interest in such other part or surplus of his personal estate not specifically devised or given away as aforesaid; and also, whether he was not en-

titled thereto, by operation of law as executor."

[318] The bill was dismissed without costs, as to the personal estate generally, without making any distinction. *Reg. Lib.*

(2) Lord *Eldon*, C. in *Dawson v. Clarke*, 18 *Ves.* 254, is reported to have observed, that "the proposition of the appointment of executors giving them every thing not disposed of," is incorrect; and that the "strongest way of putting it, that such alone must pass to him as the testator meant to dispose of;" his Lordship expressly negating the case of lapse. Although this is incontrovertible in the case of lapse of a residue (which comprises the whole subject matter) agreeably to *Bennet v. Batchelor*, 3 *Bro.* 28, and 1 *Ves. jun.* 63; yet the principal case of *Wilson v. Ivat*, certainly seems an express decision to the contrary, as to lapse in the case of a mere legacy. The reasoning of the Master of the Rolls there seems also very strong; add to which the opinion of Lord *Thurlow*, C. in 1 *Ves. jun.* 67. The author of these notes is doubtful whether he is right in supposing there is actually a difference of opinion between those great Judges on the lapse of a mere legacy, or whether the present Lord Chancellor's observations are to be confined to the lapse of a residue as exemplified in *Bennet v. Batchelor*.

It is to be observed, that in the principal case, the specific articles bequeathed to the testator's wife, having lapsed by her intermediate death, fell by operation of law, into the residue; to whomsoever belonging; and that the residue in general was held to have vested in the executor both by operation of law and beneficially, without any distinction; although the very point in question was raised by the pleadings, and argued at the bar, as appears in the extract from *R. L.* and in the report.

Lord *Thurlow*, C's observations, 1 *Ves. jun.* 67, seems to confirm these sentiments.

(3) Nor even by a pecuniary legacy to his children, &c. See in *B. Cloyne v. Young*, 1 *Ves.* 91.

As to the cases in general between executors and next of kin relative to the residue, see the notes on *Blinkhorn v. Feast*, and *Bp. Cloyne v. Young*, *antea* (262), and (285).

BAKER *versus* BAKER, Feb. 19, 1750.

(*Reg. Lib.* 1750. *A. fol.* 285.)

VOL. II. page 167.—Bastard—Question, as to whether a bastard could take under the denomination in a will, of “eldest son,” by way *descriptionis personæ*, the testatrix knowing of his existence, and believing that there was no lawful issue.

NOTES AND OBSERVATIONS.

THE bill charged “that the daughter not having made the plaintiff a party to that suit, it did not appear she had any son, but it was alleged that she had not any lawful issue of her body; which the plaintiff charged was an imposition upon the Court, inasmuch as the plaintiff was then an infant, and had no notice of the suit; and as he was not made a party thereto, it was not before the Court to determine whether the devise in favour of the plaintiff, as her eldest son, was a good devise to him; for the testatrix was before, and at the time of making her will, well acquainted with the situation and circumstances [320] of her daughter, and of her family, and knew, or had good reason to believe, that she had no lawful issue; but that she had children by *Baker* then living, particularly the plaintiff her eldest son; which the testatrix was made acquainted with from time to time by her daughter, by means of several letters before the making of the will.” The matter was afterwards compromised. *Reg. Lib.*

MORRIS *versus* DILLINGHAM, *et e contra*,

February 20, 1750.

(*Reg. Lib.* 1750. *B. fol.* 667 and 669.)

VOL. II. page 170.—Rolls.—Sir J. Strange, M. R. Demand of interest on arrears of an annuity waived, as not likely to prevail(1) under the circumstances.

NOTES AND OBSERVATIONS.

(1) It appears that the demand, however favoured by the M. R. was ultimately waived. *R. L.* 669.

The marginal note of Mr. *Vesey* in the report, must be attended to with much caution.

Though the Court has given interest upon sums reported due, &c. under very peculiar circumstances, as in *Bickham v. Cross*, 2 *Ves.* 472 (as to which see 2 *Ves.* jun. 160, 164, and 166); it has in general been disinclined to give such directions; and Lord *Hardwicke* thought himself obliged to refuse giving interest on the arrears of an annuity in a very hard case, and where he would have done it if he could properly. See the case of the [321] *Duchess of Wharton*, in *D. Bedford v. Coke*, 2 *Ves.* jun. 166, 167, and 1 *Dick.* 178. Lord *Thurlow*, C. directed interest on such arrears, in *Morgan v. Morgan*, 2 *Dick.* 643; taking the distinction, however, that the fund was not only effective, but also that the party had been debarred from her intention of enforcing payment of the annuity at law, by an injunction. Vide also the note on [another branch of the cause of] *D. of Bedford v. Coke*, (2 *Ves.* 116) *antea* (293).

E. OF STAFFORD *versus* BUCKLEY, Feb, 23, 1750.

(*Reg. Lib.* 1750. *A. fol.* 321, entered "*E. of Stafford v. Cantillon.*")

VOL. II. page 170.—Annuity in fee(1) granted by K. Ch. II. out of Barbadoes duties, is not a rent, nor realty; nor within the statutes either of frauds, or de donis, &c. Therefore being settled on A. "and the heirs of her body," it was held to amount to a fee simple conditional at the common law, the remainder over being void; and that A. having had issue, might bar the possibility of reverter.

Personal estate incapable of entail.(2)

A particular sum being given for maintenance will not bar the party from being entitled to the surplus profits.

Mortgages of turnpike tolls, poor's rates, and county rates, are within the statute of Mortmain.

NOTES AND OBSERVATIONS.

(1) *VIDE Smith v. Pybus*, 9 *Ves.* 566, and the cases therein cited.

(2) See the cases referred to by the Index.

The case of Lord *Beauclerc* and Miss *Dormer*, cited p. 174, is in 2 *Atk.* 308, which Lord *Thurlow*, C. observed was a good report. See 1 *Bro.* 190. *Bagshaw v. Spencer*, cited p. 175, is in 1 *Ves.* 142, and 2 *Atk.* 570, 577. *Snell v. Read*, cited p. 182, is in 2 *Atk.* 642; vide page 646, &c. *ibid.*

The case of the New River Company, cited also p. 182, is in 3 *Atk.* 336, &c.

See the judgment, p. 177. It should be observed, that money secured upon turnpike tolls is within the Mortmain act; see *Knapp v. Williams*, 4 *Ves.* [322] 430, note; also *Howse v. Chapman*, *ibid.* 542. So is money secured by an assignment of Poor's Rates and County Rates, *Finch v. Squire*, 10 *Ves.* 41.

As to some points mentioned p. 179 and 180, see in *Williams v. Jekyll*, &c. 2 *Ves.* 681, 683, &c.; and *Good-*

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wyn v. Goodwyn, 1 *Ves.* 226, 228, *et antea* and (117); *Bailis v. Gale*, 2 *Ves.* 48, *et antea* (268).

Notwithstanding what is said in p. 180, that a possibility is not grantable over by a subject, it is yet devisable where coupled with an interest; see in *Perry v. Phelps*, 1 *Ves. jun.* 254, and the notes.

VAUGHAN *versus* FARRER, Feb. 26, 1750.

(*Reg. Lib.* 1750. *B. fol.* 545.)

VOL. II. page 182.—Mortmain, statute Geo. II. c. 36. Bequest of residue of personal estate in trust, “to erect an hospital,” not void; it not being given to be laid out in land.—Held, that in such case, the word “erect” did not of necessity imply “to build;” but only imported the foundation of a charitable institution metaphorically.(1)

An express estate for life not enlarged by implication, unless necessary; as to preserve the clear intent for a line in succession. The words “dying without issue,” construed in respect of personal estate, in the popular sense; so as to preserve the limitations over.(2)

NOTES AND OBSERVATIONS.

(1) THIS doctrine, however, is now over-ruled, see *Ambler* 616, 751, 752; 1 *Bro.* 444, note; 6 *Ves.* 404, 407, &c.; 8 *Ves.* 186, 191; 9 *Ves.* 535, &c. *et postea* in the note to *Attorney General v. Bowles*, which is in 2 *Ves.* 547.

The case referred to p. 184, is *Mogg v. Hodges*, 2 *Ves.* 52, *antea* 269.

The *Attorney General v. Meyrick*, cited page 184, is in 2 *Ves.* 44, *antea* 267.

The case mentioned at the top of page 185, is *Cantwell v. Baker*.

[323] (2) See p. 183 and 186. [In the case of a bequest of a chattel, or term, the words “dying without issue,” shall be considered with a double aspect, comprising two contingencies; the one, if the person die

without leaving issue, the other, if he die leaving issue, which afterwards die without issue. *Per Buller, Just.* Note to the Irish edition of *Ves.*]

PEACOCK *versus* MONK, *Feb.* 27, 1750.

(*Reg. Lib.* 1750. *B. fol.* 299.)

VOL. II. page 190.—S. C. antea, 80.—Baron and feme. Wife having specific effects to her separate use, disposes of her separate property by will. After her death, her husband sells part of these effects, and dies: his representative is accountable to the wife's administratrix with the will annexed.(1) Account of wife's separate estate, or pin-money, never carried back beyond the year.(2)

A wife may dispose of her separate personal estate by act in her lifetime, or by will. As to her real estate, all that is not properly conveyed descends to her heir; and no part of it is bound by any bare agreement, in so far as respects her heir.(3)

As to the execution of powers by femes covertes.(4)

Said, that if a feme covert borrows money on the security of her separate estate, her declarations, as such debtor, may be read in evidence.(5)

NOTES AND OBSERVATIONS.

(1) Admiral *Lestock* had, after his wife's death, sold and disposed of several specific goods and effects, which had been settled to her separate use. An account was directed as to these; and the defendant, his executor, was ordered to satisfy the amount of what should be so found due, out of the Admiral's assets, to the administratrix of Mrs. *L.* with her will annexed. *R. L.* 303.

(2) Vide also 2 *Ves.* 7.

(3) Lord *Hardwicke*, though laying down the rule generally thus, suggests a possible exception, pages 191, 2.

(4) See p. 191, et vide *Wright v. Lord Cadogan*, 1 Bro. P. C. 486, octavo edition, and 6 vol. 156, folio edit. Vide 1 *Fonb. T. E.* 91, &c.

(5) See, nevertheless, *Whistler v. Newman*, [324] 4 *Ves.* 129, and *Hyde v. Price*, 3 *Ves.* 437.

ORR *versus* KAINES, March 8, 1750.

(*Reg. Lib.* 1750. *B. fol.* 210.)

VOL. II. page 193, 4.—Rolls.—Sir J. Strange, M. R. Executor not having exhibited an inventory, and having paid all legacies but one, is a sufficient foundation to charge him with assets as to that legacy, though not positively conclusive.

An inventory solemnly exhibited not conclusive on executor, if there has been a variation of circumstances. A legatee paid by an executor voluntarily, not obliged to refund to the rest; except in the case of his insolvency.(1)

NOTES AND OBSERVATIONS.

(1) SEE *per* Lord *Hardwicke*, C. in *Moore v. Moore*, 2 *Ves.* 600. Even in the case of the executor's insolvency, legatees are not always bound to refund. The distinction seems between the cases where there was originally a deficiency of assets, and those where the executor has wasted them; vide *Walcot v. Hall*, 1 *P. W.* 495, note to the fifth edition, and *S. C.* 2 *Bro.* 305.

LORD TEYNHAM *versus* WEBB,

May 2, 1750.

(*Reg. Lib.* 1750. *B. fol.* 369.)

VOL. II. page 198.—Vesting. Grandmother under a power creates, by deed, a term to commence after her death, for raising money for younger children; as their father should appoint: if no appointment, equally; if but one, besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed, there was one grand-son and one grand-daughter. The father afterwards had another son, and died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, and that the younger son having thus become an eldest son, was excluded.(1) Elder son unprovided for considered as a younger.(2) Vesting not suspended, in general, by a power to appoint.(3) Portions not to be raised for the representative of a child, who died before it was naturally required.(4)

NOTES AND OBSERVATIONS.

(1) LORD *Hardwicke* determined this point, not merely on the intent (as to which, see p. 211,) but on the authority of *Doleman v. Chadwick*, 2 *Vern.* 528, which has frequently been approved, and acted upon. See the principal case, p. 210, &c. and *Chadwick v. Doleman*, 528, &c. Mr. *Raithby's* edition, which (*inter alia*) cites *Broadmead v. Wood*, 1 *Bro.* 77.

Vide also in *Hubert v. Parsons*, 2 *Ves.* 261, &c.

(2) See page 203, note. Also in *Coleman v. Seymour*, 1 *Ves.* 210. *Emery v. England*, 3 *Ves.* 232. *Lady Lincoln v. Pelham*, 10 *Ves.* 166. *Bowles v. Bowles*, *ibid.* 177.

As to the instance mentioned in the argument, p. 199, of a sum to younger children, payable at a future time, see 2 *P. W.* 612, note; and *Bolger v. Mackell*, 5 *Ves.* 509.

Hodgson v. Rawson, cited *ibid.* is in 1 *Ves.* 45, and 2 *Atk.* 127.

Graham v. Lord Londonderry, cited *ibid.* is in 3 *Atk.* 393.

Hall v. Terry, mentioned p. 202, as cited in *Hodgson v. Rawson*, 1 *Ves.* 44, is much better reported, 8 *Vin. Ab.* 383, pl. 36, than by *Atkyns*. Lord *Thurlow*, C. disapproved of *Hall v. Terry*, vide 1 *Bro.* 194. See the note on *Hodgson v. Rawson*, *antea*, 37.

(3) *Lomax v. Holmden*, cited p. 205, is in 1 [326] *Ves.* 290, *et antea*, 152.

As to the points mentioned under this head, p. 208, see *Gordon v. Levi*, *Amb.* 364. *Doe v. Martin*, 4 *T. R.* 39, and *Smith v. Lord Carrington*, 2 *Ves.* jun. 698, &c. Also *Loder v. Loder*, 2 *Ves.* 530.

(4) Vide *Hubert v. Parsons*, 2 *Ves.* 261.

Beal v. Beal, cited p. 210, is in 1 *P. W.* 244. Vide *ibid.* 451, 487, and 2 *Atk.* 456. *Hele v. Bond*, cited p. 211, is in *Prec. Ch.* 474, and 1 *Eq. Ca. Ab.* 342.

LLOYD *versus* TENCH, *March 6, 1750.*

(*Reg. Lib. 1750. B. fol. 283.*)

VOL. II. page 213.—Statute of distributions. Where no issue, nor brother or sister of an intestate, an aunt takes under the statute equally with nephews and nieces. In such case they take *per capita*, and not *per stirpes*. (1) Bill of interpleader dismissed with costs, where the question could be determined in the principal suit. (2)

NOTES AND OBSERVATIONS.

(1) VIDE also *Davers v. Dewes*, 3 P. W. 50. *Bowers v. Littlewood*, 1 P. W. 595. *Durant v. Prestwood*, 1 Atk. 454, and *Stanley v. Stanley*, 1 Atk. 455.

(2) In this case originally, letters of administration had been granted to the defendant *Tench*, under which he had received part of the effects. These were afterwards revoked for want of jurisdiction, and letters of administration granted to the aunt. The latter had brought an action against *Tench*, for the effects thus possessed by him.

Tench filed a bill, praying that the aunt, &c. [327] might set forth their respective claims, and interplead, &c.; and for an injunction, &c. The bill was dismissed at the present hearing with costs. *Reg. Lib.*

Wallis v. Hodson, cited p. 213, is in 2 Atk. 115, and *Barn. Ch. Rep.* 272.

HAMPSHIRE *versus* PIERCE, *March 7, 1750.*

(*Reg. Lib. 1750. A. fol. 319.*)

VOL. II. page 216.—Parol evidence admitted to explain a will, where doubtful: not to contradict. (1)

NOTES AND OBSERVATIONS.

(1) SEE *Goodinge v. Goodinge*, 1 *Ves.* 231; vide also 2 *Ves.* 28. *Abbot v. Massie*, 3 *Ves.* 148. *Beaumont v. Fell*, 2 *P. W.* 140. *Price v. Page*, 4 *Ves.* 680. *Smith v. Coney*, 6 *Ves.* 42. *Hunt v. Hort*, 3 *Bro.* 311; per Lord Eldon; C. 6 *Ves.* 397, &c. and 1 *Rop. on Leg.* 138, &c.

DIXON versus PARKER, March 8, 1750.

(No Entry.)

VOL. II. page 219.—Evidence—Witness—Depositions of one defendant not read in favour of another, where the former is at all concerned in interest, or a decree can be made against him. Such objection is wholly as to his incompetency.

Though a plaintiff at law is not allowed to examine any defendant as a witness, one defendant may there examine a co-defendant. In Equity, a plaintiff may examine a defendant; and a defendant a co-defendant, but then it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. &c. (1)

The statute of frauds does not enable a party to commit a fraud; as in the case, where a mere mortgage being contemplated, and an absolute conveyance made by one deed with the intention of a defeazance being executed by another, which never takes place, &c. &c. (2)

NOTES AND OBSERVATIONS.

(1) THE depositions even of a plaintiff have been read in Equity; he having been disinterested at the time of their having been taken. *Goss v. Tracy*, 1 *P. W.* 287, 289. Vide in *Glynn v. B. of England*, 2 *Ves.* 42, et ante (266;) and an order was made on motion of a defendant to examine a plaintiff, saving just ex- [328] ceptions, he consenting to be examined. *Walker v. Wingfield*, 15 *Ves.* 178. Et vide *Armiter v. Swanton*, *Amb.* 393.

As to the distinction between the examination of a bare

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trustee, and of an executor in trust, see in *Croft v. Pyke*, 3 P. W. 180, 181, &c. and the notes.

(2) See the note 3 Ves. jun. 38, &c. &c.

ROBINSON *versus* ROBINSON, March 9, 1750.

VOL. II. page 225.—S. C. 3 Atk. 736. Et vide Burrow. 38, and 3 Bro. P. C. 180, 8vo. edit. and 5 vol. 278, folio.

Devise to H. for life and no longer, taking the name of R.; and to such son as he should have, taking the name; and in default of such issue, remainder over.—Held an estate to H. in tail male.

NOTES AND OBSERVATIONS.

Coryton v. Hellier, mentioned p. 226 and 227, is cited in *Targus v. Puget*, 2 Ves. 195.

Lomax v. Holmden, mentioned p. 228, is in 1 Ves. 290. *Penhay v. Harrel*, cited p. 230, is in 2 Vern. 370, &c.

Observe particularly Mr. *Raithby's* note, page 372. *Hopkins v. Hopkins*, cited p. 230, is in 1 Ves. 268, and 1 Atk. 581.

The Act of Parliament mentioned p. 231, is the 10th and 11th Will. III. c. 16.

[329] CLARK *versus* THORP, March 9, 1750.

(Reg. Lib. 1750. A. fol. 245.)

VOL. II. page 232.—Waste by guardian, converting ancient pasture into arable, though possibly for a temporary benefit.

CLAVERING *versus* CLAVERING, March 11, 1750.

(Reg. Lib. 1750. A. fol. 307.—and Reg. Lib. 1751. A. fol. 421.)

VOL. II. page 233.—Evidence—The same rule of evidence at Law and in Equity as to the loss of a deed. (1)

On liberty given to bring an action, unnecessary to order that the depositions shall be read at law.

NOTES AND OBSERVATIONS.

THIS was the sound doctrine, see 1 *Ves.* 233, &c. and *Askeu v. The Poulterer's Company*, 2 *Ves.* 89. Vide, however, the note on that case, *antea* (284.)

(1) The plaintiff instituted this suit as heir in tail under an alleged settlement, after the death of his elder brother, who died without issue, and had not barred the intail, against the parties in possession, praying an account of rents and profits, &c. &c. delivery up of the settlement, &c. and of the estate. The material defendant, who was in possession under the will of her late husband, the elder brother, alleged that he was seized in fee, and denied that any such settlement was ever executed; stating, that the plaintiff's father was incapable of executing it as alleged, since he was not of age at that time; she admitted she had in her custody a parchment writing, or [330] deed poll, purporting to be an indenture of settlement; but insisted, that in regard it was not in fact indented, and appeared never to have been executed by any of the parties, and as it had not any attestation of its execution, it ought to be considered as a nullity, and not to operate to any of the uses therein limited. She stated, that the father having conveyed the estate to his eldest son in fee, and he having devised it, she was entitled to the possession under his will.

The bill was retained for twelve months, with liberty for the plaintiff to bring an ejectment, the defendants to admit the plaintiff to be heir of the body, and not to set up any outstanding term, &c. All deeds, &c. to be produced.

The trial took place at the ensuing Assizes, when a verdict was found for the plaintiff. The cause, coming on upon the equity reserved, stood over for the defendants to consider, whether they would submit to a decree accord-

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ing to the verdict as found, without costs on either side; or would proceed to the trial of an issue, whether a settlement, agreeable to the contents of the parchment writing, was executed or not, at the peril of costs. The defendants submitted to a decree. *Reg. Lib.* 1751, *A. fol.* 421, 422.

[331] THEEBRIDGE *versus* KILBURNE,

March 13, 1750.

(*Reg. Lib.* 1750. *B. fol.* 198.)

VOL. II. page 233.—Trust of a chattel real for S. for life, and immediately after her death for the “heirs of her body,” with limitations over. The whole interest vested in S. As to where the words “heirs of the body” have been held words of purchase in the same sense as “issue.”(1)

NOTES AND OBSERVATIONS.

Withers v. Algood, mentioned p. 234, is cited also in *Bagshaw v. Spencer*, 1 *Ves.* 150.

Sands v. Dixwell, mentioned *ibid.* is also cited 2 *Ves.* 652. *Hodsell v. Bussey*, mentioned p. 235 and 236, is also cited 2 *Ves.* 652. *Butterfield v. Butterfield*, mentioned p. 235, is in 1 *Ves.* 133, 154, *et antea* 81.

(1) See p. 238 of the report.

TICKEL *versus* SHORT, March 14, 1750.

(*Reg. Lib.* 1750. *B. fol.* 238.)

VOL. II. page 239.—Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent employed by him [ignorant of such deception.]

If merchant keeps an account current by him two years without objection, it is considered as a stated account.(1)

NOTES AND OBSERVATIONS.

THERE is no further entry of this case in *R. L.* than the dismissal of the bill.

(1) See also 2 *Atk.* 252.

DENTON *versus* SHELLARD, [332]
March 16, 1750.

(*Reg. Lib.* 1750. *A. fol.* 232.)

VOL. II. page 239.—Rate of interest.(1)

NOTES AND OBSERVATIONS.

(1) THE rate of interest now, where interest is directed generally, is 4 *per cent.* which is called “the interest of the Court.”

As to some of the former cases on the subject, see *Bryant v. Speke*, 1 *Ves.* 171, and *Lord Trimlestown v. Colt*, *ibid.* 277.

JONES *versus* LEWIS, March 18, 1750.

(*Reg. Lib.* 1750. *A. fol.* 309.)

VOL. II. page 240.—A decree having been made for a general account and payment of the balance against a party who died, and his personal representative having delivered certain goods, part of the effects, to her own solicitor, to be delivered over, not answerable in the event of his being robbed of them.

Tender of the goods not incumbent on her.

She would not have been answerable if they had remained in her own possession till the accident.

KIRBY *versus* CLAYTON, March 23, 1750.

(*Reg. Lib.* 1750. *A. fol.* 299.)

VOL. II. page 241.—The Court will not direct money to be paid to a party entitled in remainder, upon the improbability of an intermediate event, if such event be possible.

FULLER *versus* HOOPER, March 23, 1750.

(Reg. Lib. 1750. A. fol. 290 and 237.)

VOL. II. page 242.—Testatrix gives, by her will, legacies to all her nephews and nieces, except those thereafter named: she desires her executors to look upon all memoranda, &c. in her own hand, as parts, or a codicil to, her will; and bequeaths by the will her residue to the children of her sisters, E. J. &c. By a codicil she gives legacies to some other nephews and nieces. Held, that the children of E. J. &c. the residuary legatees under the will, were excluded from the legacies; but that the legatees under the codicil were not, and were entitled to both. “Testament” includes a will, codicils, &c. “Instrument” signifies the will alone. (1)

NOTES AND OBSERVATIONS.

(1) As to some points on these heads, see in *Crosbie v. Mac Dowal*, 4 Ves. 610.

In the principal case the questions came before the Court on a petition to vary the minutes of a decree, which was presented on behalf of the plaintiffs. It stated it to have been declared by the decree, “that the plaintiffs J. F. and E. S. and the defendant *Elizabeth Isted*, being the nephew and two nieces of the testatrix, named in her will, after the bequest of legacies of 50*l.* a piece to certain of her nephews and nieces, were not entitled to legacies of 50*l.* a piece by virtue thereof;” and further, that by the will, the testatrix devised “to all her nieces and nephews, children of her sisters E. F.; A. Isted; M. G.; and E. C. except those thereafter named, 50*l.* each, and directed that her executors should look upon themselves as obliged to perform any gift by inventory out of her household goods, &c. which should be found inclosed in her will; together with all memorandums which were found in her own hand; and were, at all times, to be looked upon as parts, or a codicil, of that her last will, though not annexed to it in form of law:” and stating, that *Ambrose Isted*, one of the defendants, and the son of *Ann Isted*, a sister of

the testatrix, was named in the will, after the devise of 50*l.* each to her nephews and nieces before mentioned ; and that several of the other defendant's nephews and nieces were named in a codicil, under the hand of the testatrix, and that legacies were thereby given them ; from which circumstances the petitioners apprehended that as the codicil was declared by the testatrix to be a part of her will, all of such defendants were, by the intention of the testatrix, excluded from the legacies given as above mentioned, and that it was the intention of the Court so to have declared at the hearing. It was therefore prayed that the minutes might be rectified accordingly. The Lord Chancellor inserted the declaration prayed in respect of *Ambrose Isted* only ; and dismissed the petition as to the rest. *Reg. Lib. ubi supra.* It appears from the will, stated in *Reg. Lib.* (same year, fol. 327,) that *Ambrose Isted* was not specified therein by name, but that he was entitled to a share of the residue thereby bequeathed, as one of the children of the testatrix's sister, *Ann Isted*.

BROWNSWORD *versus* EDWARDS, March 20, 1750.

(*Reg. Lib.* 1750. *A. fol.* 226, 227.)

VOL. II. page 243.—Plea allowed to discovery of a marriage which would subject one of the parties to punishment(1) in the Ecclesiastical Court; the other being dead. What averments are proper to support a plea.(2) Demurrer.—Questions even of title, construction of wills, &c. determined on demurrer, if quite clear on the face of the bill, that the determination must be on the same matters in the more protracted way at last. Question as to an adequate estate tail.

NOTES AND OBSERVATIONS.

(1) SEE *Harrison v. Southcote*, 2 *Ves.* 389, and *Chetwynd v. Lindon*, *ibid.* 451. Vide also *ibid.* 493 ; 1 *Atk.*

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539; 2 *Atk.* 393; 1 *Bro.* 77; 2 *Atk.* 200; 1 *Ves.* 246-7; 3 *P. W.* 376, &c.

(2) [Averments are necessary to exclude in-
[335] tendments, which would be made against the
pleader; for the Court will always intend the
matters charged against the pleader, unless fully denied.
2 *Atk.* 241; *Gilb.* 185.]

See further in *Bayley v. Adams*, 6 *Ves.* 586, &c.

Ex parte WILLIAMSON, March 25, 1751.

VOL. II. page 249.—S. C. 1 *Atk.* 82.—Bankrupt. Certificate allowed, notwithstanding a suspicion in the Court as to the view in taking out the commission.(1) Former practice of traders in Ireland coming over and contracting debts in England, where they procured commissions of bankruptcy to be taken out against themselves by collusion.(2)

NOTES AND OBSERVATIONS.

(1) SEE *ex parte King*, 11 *Ves.* 417, and 13 *Ves.* 181. Agreeably to what is said by Lord *Hardwicke*, p. 250.

A mandamus will not lie to compel the allowance of a certificate. See 7 *East Rep. K. B.* 92.

[(2) The bankrupt laws have been adopted in Ireland by stat. 11 and 12 Geo. III.]

RIGDEN versus VALLIER, March 25, 1751.

(*Reg. Lib.* 1750. B. fol. 279.)

VOL. II. page 252.—S. C. 3 *Atk.* 731. A father by deed poll, reciting his intention of settling and assuring all his real and personal estate on his family after his decease (inter alia,) grants “in consideration of natural love and affection,” lands to two of his children and their heirs, “to be equally divided between them,” but does not make livery. This deed held to operate in nature of a testamentary instrument, and being made in consideration of natural love, &c. was held to amount to a

covenant to stand seised. The children considered to take as tenants in common both by the words used, and also from the nature of the provision.(1) Where an estate, subject to a question of law, is of small value, [and a Court of Equity does not think proper to decide it,] the Court will direct a case to be argued and heard before two Judges at Chambers, instead of being set down in the special paper of the Court at Law.(1)

NOTES AND OBSERVATIONS.

(1) No case was directed. The Court declared, "that the defendant *M. V.* was entitled to one moiety of the estate; and that the other moiety thereof [336] ought to be divided between the plaintiffs and defendants in thirds; and that the said defendant *M. V.* was also entitled to one-third of that moiety; that the plaintiff *E. R.* was entitled to one other third thereof; and that the three other plaintiffs, *W.*, *T.* and *G. R.* were entitled to the remaining third thereof." An account was directed of the rents and profits "accrued from the beginning of one year before the filing of the bill; the balance upon which was to be divided in the above mentioned proportions; and a partition was directed." *R. L.*

Words even of survivorship, in a will, shall not defeat the effect of words importing a tenancy in common; but shall be referred to some time, as the death of a tenant for life, or even to the death of the testator; although this would be a construction not to be adopted if there could be any other. *Russell v. Long*, 4 *Ves.* 551. See also *Perry v. Woods*, 3 *Ves.* 204.

The note to p. 256, in the third edition of *Ves. sen.* refers to *Cowp.* 657, where Lord Mansfield agreed with Lord Hardwicke in this case, and with the doctrine laid down by Gould, J. in *Fisher v. Wigg*, 1 *P. W.* 14, against the opinion of Lord C. J. Holt, and cites *Cro. Eliz.* 695; 2 *Roll. Ab.* 39; 1 *Eq. Ca. Ab.* 292; pl. 10; *Prec. Ch.* 164, 491; 1 *Bro.* 118; 1 *Ves.* 13; and 3 *Ath.* 524. Likewise 2 *Ath.* 122, and 1 *Durn. & East*, 597.

OLDHAM versus HAND, April 24, 1751.

VOL. II. page 259.—Gift to an attorney after the cause was over, without proof of any thing improper, not set aside. It would have been otherwise, if before the cause, as in contemplation of it; or during its progress.(1)

NOTES AND OBSERVATIONS.

(1) *VIDE* in *Cray v. Manfield*, 1 *Ves.* 379, *et antea*, 167.

HUBERT versus PARSONS, April 29, 1751.

VOL. II. page 261.—Trust “to raise” 5000*l.* portion “and pay it” to such younger child as the father should appoint; for want of appointment to the younger children at 21, with interest for their maintenance,(1) &c. in the mean time, &c. &c. The only younger child died at two years old. Held not to be vested in him, so as to be claimed by the father as his representative.(2) Portions by will governed by rules from the civil law, not applicable to a deed.(3)

NOTES AND OBSERVATIONS.

(1) *SEE* p. 263, 264, and *Batsford v. Kebbell*, 3 *Ves.* 363.

(2) *See* in *Lord Teynham v. Webb*, 2 *Ves.* 198, and 209, *et antea* (325.)

(3) *See* pp. 262, 263; *et vide* 2 *Ves.* 207, and 2 *Cox P. IV.* 612, note. *Vide* also *Bolger v. Mackell*, 5 *Ves.* 509.

BLANCHET versus FOSTER, April 29, 1751.

(*Reg. Lib.* 1750. .2. fol. 448.)

VOL. II. page 264.—Bond by a woman about to marry, without her intended husband’s knowledge, but for valuable consideration in respect of an antecedent debt. Held, the husband could not be relieved against it. Concealment, however, of such securities and debts not to be encouraged.(1)

NOTES AND OBSERVATIONS.

THIS principle was recognised in *Lady Strathmore v. Bowes*, *et c contra*, 1 Ves. jun. 28. But that case turned on particular circumstances of stragem and fraud on the part of the husband. See 2 Bro. 345, S. C. and 1 Ves. jun. 22, &c. [338]

CHANCEY *versus* FENHOULET, April 29, 1751.

VOL. II. page 265.—S. C. 2 Atk. 392, and at the hearing 2 Atk. 616.

Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent, would cause a forfeiture of an estate; the bill charging there was such marriage, and no consent.

NOTES AND OBSERVATIONS.

THE report of this cause, at the hearing, is in 2 Atk. 616.

JACOMB *versus* HARWOOD, April 30, 1751.

(Reg. Lib. 1750. A. fol. 410.)

VOL. II. page 265.—Rolls. Interest on a banker's note from circumstances, though no evidence of an agreement for it. Judgment in action against a surviving partner, no extinguishment of the partnership debt in equity. Each executor has entire control over a testator's personal estate; he may release, pay, or transfer without the others. And so as to each administrator; though formerly questioned. One executor may retain in satisfaction of his own debt, if no fraud. (1) A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for the better security of a debt due from the testator to himself, the mortgagees were entitled to satisfaction, and creditors of the testator, under marriage articles, who had no specific lien, were not allowed to pursue the premises thus assigned. (2)

A mortgagee coming into Equity, or being before the Court, not sent to avail himself of his securities at law, since the matter must finally come round to the same end, on a bill to redeem.

NOTES AND OBSERVATIONS.

(1) Two separate mortgage assignments were made by *Sutton* to the defendants, for securing their respective demands, with interest. The defendant *Harwood*, who was *Sutton's* co-executor, stated that he had refused to execute either of the deeds of assignment, since he did not think it right that *Gibson's* separate estate should be thus subjected to debts from the partnership, and because *Sutton* had altered the nature of the debts, and made [339] them his own, by giving the judgments. He therefore submitted the validity of them to the stating that *Sutton* and he were, under *Gibson's* will, devisees of the mortgaged estates (amongst others) upon the trust therein mentioned ; and he submitted also whether, since it did not appear that interest was originally agreed to be paid for these demands, *Sutton* could charge their testator's estate with interest, to the prejudice of his other creditors. *Sutton* became a bankrupt, after making the mortgages, and his assignee was before the Court. An account was directed as to what was due to the plaintiffs, respectively, for principal, interest, and costs, on their respective mortgages; and a sale of the mortgaged premises was directed, the defendant *Harwood* consenting thereto. The proceeds were ordered to be applied in satisfaction of the plaintiff's several demands in the first instance, and then in payment of *Harwood's* costs. If any surplus, it was to be laid out in the name of the *Accountant General*, &c. *R. L.*

(2) The Court will not only let assets be followed in cases of fraud, or collusion (see p. 269,) but of great negligence. *Hill v. Simpson*, 7 *Ves.* 152.

REVEL *versus* FOX, May 1, 1751.

(Reg. Lib. 1750. B. fol. 349.)

VOL. II. page 269.—The fact of a marriage charged by the bill, and denied by the parties answers, (there being evidence in the cause,) must be tried at law; such matters being the proper subject for a jury.

COWSLADE *versus* CORNISH, May 2, 1751.

VOL. II. page 270.—A party to a cause may be examined on new interrogatories in the Master's office without a new order, the Master being the proper judge:

In the case of a witness it is different, for under a commission to examine, there must be a new order for new interrogatories.(1)

NOTES AND OBSERVATIONS.

(1) [But the Court and the Bar agreed in *Andrews v. Brown*, *Prec. Ch.* 386, that in the Examiner's office either party might, without application to the Court, exhibit interrogatories for further examination of the same witness, &c.; though no new interrogatories could be exhibited under a commission without an order for the purpose. *Gilb. Rep.* 41; 1 *Eq. Ab.* 233; *Hinde's Ch. Pract.* 317. See 1 *Bro.* 388. In 2 *Bro.* 15, interrogatories to falsify an examination, were ordered of course without notice.] Note to the third edition.

E. of GODOLPHIN *versus* PENNECK, [341]
May 3, 1751.

(Reg. Lib. 1750. A. fol. 404.)

VOL. II. page 271.—Under a devise that all testator's debts "should be first paid and satisfied." Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all.

NOTES AND OBSERVATIONS.

VIDE *Leigh v. E. of Warrington*, 1 Bro. P. C. 511, octavo edition; and 4 vol. 90, folio. The author of these notes is in possession of a MS. report of this case on the first appeal before Lord C. King, in which the statement of that part of the will, held to amount to a charge, rather differs from the report of it in *Bro. P. C.* In the latter, after the preamble, "As to my worldly estate," &c. the direction of the will is merely that the debts "be discharged and paid;" whereas the MS. Rep. proceeds thus:—"out of my worldly estate." In support of the charge were cited 2 Vern. 708; 1 Vern. 411; *ibid.* 45; 2 Vern. 228 and 690; and *Harris v. Ingledew*, [3 P. W. 91.] The hearing of this first appeal was on the 17th of May, 1732. The Lord C.'s judgment on this point is thus reported in the author's MSS.

"I think the personal assets must first be applied as far as they will go; but to see how far the real estate is chargeable, we must consider the words of the will. He wills, 'that his debts be paid out of his worldly estate;' and the words worldly estate take in the real as well as personal estate. Now, though there be a devise of several parts of the real estate, chargeable with the annuity, yet [342] that does not defeat the charge which was laid on it by the words worldly estate, which take in every thing, as well real as personal. The personal assets must first be applied as far as they will go; then in case of a deficiency to come upon the real." MSS.

Lord Loughborough, C. in *Williams v. Chitty*, thought *Leigh v. Lord Warrington*, a strong case; and seems to have been of the same opinion as to the principal case above. See 3 Ves. 551, 572.

Sir William Grant, M. R. was of opinion in *Powell v. Robins*, 7 Ves. 209, that the mere direction that all debts "should be paid," or "should be paid by executors,"

will not of itself amount to a charge. See 7 *Ves.* 211. His Honour is supported in this by *Bridges v. Landen*, and *Keeling v. Brown*, relied on by him in 7 *Ves.* 211. There must, however, be some mistake in classing *Williams v. Chitty*, with these cases, since the decision amounts to the very reverse. See 3 *Ves.* 552. It is indeed impossible to reconcile all the decisions on these points; though it may, in general, be observed, that the older cases seem more favourable to charging the real estate than the latter. The Court, however, seems always to have agreed in favour of the charge where the executor was also a devisee. *Clowdesley v. Pelham*, 1 *Vern.* 411; *Elliot v. Hancock*, 2 *Vern.* 143; *Stanger v. Tryan*, and *Hay v. Townshend*; Mr. Raithby's note to 2 *Vern.* 709; *Keeling v. Brown*, 5 *Ves.* 361; *Finch v. Hattersley*, stated 7 *Ves.* 210, 211.

As to the distinction made by some Judges be- [343]
tween construing a charge in favour of debts,
and not of legacies, see *Davis v. Gardiner*, 2 *P. W.* 187,
190; *Kightley v. Kightley*, 2 *Ves.* jun. 328; 3 *Ves.* jun.
551; *Keeling v. Brown*, 5 *Ves.* 359, 362. Et vide *Alcock*
v. Sparhawk, 2 *Vern.* 228, 229.

Ex parte MATTHEWS, May 3, 1751.

VOL. II. page 272.—Mortgage of a ship at sea good in bankruptcy, notwithstanding the statute of Jac. I. if the party procures the bill of sale, &c.

Contra, if he is incautious or negligent; as by suffering the ship to come back, and go on another voyage.(1)

NOTES AND OBSERVATIONS.

Brown v. Heathcote there cited, is in 1 *Atk.* 160; *Ryal v. Rowles*, *ibid.* is in 1 *Ves.* 348 (quod vide); and 1 *Atk.* 165. See there the notes to Mr. Sanders's edition.

(1) See *Bourne v. Dodson*, 1 *Atk.* 154; et vide *Rolleston v. Hibbert*, 3 *T. R.* 406; and *Mestaer v. Gillespie*, 11 *Ves.* 621, with the cases referred to.

ATTORNEY GENERAL *versus* COOK, May 4, 1751.

(*Reg. Lib.* 1750. *A. fol.* 370.)

VOL. II. page 273.—After a bequest, before the Mortmain act, of 50*l.* charged on land to P. J. the minister of a Baptist meeting-house, certain other premises⁽¹⁾ were devised away, charged with an annuity of 10*l.* “to the minister belonging to that meeting-house.” This held a valid⁽²⁾ charitable bequest for the ministers in succession, and not personal to P. J.

NOTES AND OBSERVATIONS.

(1) THE 50*l.* and the annuity of 10*l.* were charged on distinct premises. *R. L.*

The case of *Lloyd v. Spillet*, cited p. 273, from 3 *P. W.* was affirmed on a re-hearing by Lord [344] *Hardwicke*, C. See 2 *Atk.* 148, and *Barn. Rep. Ch.* 384.

De Costa v. De Pays, cited p. 274, is in *Ambler*, 228; as to which see Lord *Hardwicke's* reasoning, stated from his notes, 7 *Ves.* 76, 77. See also *Isaac v. Gompertz*, stated 7 *Ves.* 61.

(2) As to what is said, p. 276, see *Corbyn v. French*, 4 *Ves.* 418.

PINNEL *versus* HALLET, May 11, 1751.

(*Reg. Lib.* 1750. *B. fol.* 590.)

VOL. II. page 276.—The purchase of houses in London, and of lands of the tenure of borough English,⁽¹⁾ held not to be a due execution of a covenant in marriage articles to purchase or settle “lands of inheritance.” As to the mode of computing the value of premises in the Master’s office.⁽²⁾

NOTES AND OBSERVATIONS.

(1) A LIKE declaration was made by the Court on this point, which is not at all noticed in the report. The co-

venant was general to settle "lands of inheritance." *R. L. ubi supra, et fol. 593.*

(2) See page 277 of the report.

BOON *versus* CORNFORTH, May 13, 1751. [345]

(*Reg. Lib. 1750: A. fol. 399.*)

VOL. II. page 277.—Will, construction of.—Repugnant words in a will may be rejected or transposed. Court rejected a repugnancy by interlineation. Bequest of the use and enjoyment "of every thing else at my house," means such things as are proper to go with the house as heir-looms, *viz.* fixtures and ornaments, not watches, &c. &c. (1) Estate for life in lands, by implication, rebutted by the party having a bequest for life in a particular part of them, and by testator desiring she should not be turned out.

NOTES AND OBSERVATIONS.

(1) SEE *Trafford v. Trafford*, 3 *Atk.* 347; *Chapman v. Hart*, 1 *Ves.* 271, 273, *et antea* (138), and *Stuart v. M. of Bute*, on re-hearing, 11 *Ves.* 657, with the cases referred to.

TAYLOUR *versus* ROCHFORD, May 18, 1751.

VOL. II. page 281.—Sale of a seaman's prize money, (1) and subsequent agreement in confirmation, (2) set aside.

NOTES AND OBSERVATIONS.

(1) EVERY instrument whereby a seaman or mariner conveys his prize money or wages, in the hands of the public officers, must now be in the form prescribed by statute 26 Geo. III. c. 63, and the other statutes referred to. 6 *T. R.* 426.

(2) As to the doctrine on confirmation, see in *Morse v. Royal*, 12 *Ves.* 355, *passim*.

Baldwin v. Rochford, cited p. 282, is in 1 *Wils.* 229. *Stapilton v. Stapilton*, cited p. 283, is in 1 *Atk.* 2. Lord

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Chesterfield v. Janssen, cited *ibid.* is in 2 *Ves.* 125, *et antea* (297); and 1 *Atk.* 301. *Coton v. Luttrell*, mentioned p. 285, is stated in the same vol. 220, 223.

[346] JACKSON *versus* KELLY, *Trin. T.* 1751.

(*Rég. Lib.* 1750. *A.* fol. 587.)

VOL. II. page 285.—Testator intending to dispose of all his personal estate, gives the residue in fifth shares; but appoints his brother “heir to whatever part of his estate should be unappropriated by his will.” One of the five shares lapsed in testator’s life-time. Held, that the above was an ultimate general residuary clause; and comprised this, as including not merely what was not mentioned, but every thing not effectually given.(1)

NOTES AND OBSERVATIONS.

(1) “IN the case of lapse of real estate the heir takes; but in the case of personal property, the residuary legatee is preferred, either to the next of kin or the executor.” Per Lord *Eldon*, C. 8 *Ves.* 25. See also in *Oke v. Heath*, and *Durour v. Motteux*, 1 *Ves.* 141 and 322, *et antea* (82) and (157); and *D. Marlborough v. Lord Godolphin*, 2 *Ves.* 61, *et antea*, (277).

The residuary legatee must, however, be a general, and not a particular one; for if the will only give a legatee what remains after payment of legacies, he will not be entitled to any benefit from lapse. See the cases in 2 *Roper on Legacies*, 490, &c.

As to the point mentioned by Lord *Hardwicke*, at the bottom of page 285, see *Peat v. Chapman*, 1 *Ves.* 542, *et antea* (241); and *Bagwell v. Dry*, 1 *P. W.* 700; with the cases in the note.

ATTORNEY GENERAL *versus* DUPLESSIS.

VOL. II. page 286.—In the Exchequer.—Waste.—Alien.—The legal disability of an alien to hold lands, neither a penalty, nor forfeiture.

NOTES AND OBSERVATIONS.

SEE *S. C.* also in 2 *Ves.* 360, 538, 555, *et postea* (); and 1 *Bro. P. C.* 415, octavo edition.

As to the demurrer mentioned at the bottom of p. 287, as overruled, with the judgment affirmed in *Dom. Proc.* the Judges in the House of Lords certified their opinion, “that the legal disability of an alien to hold lands was neither a penalty nor forfeiture.” 1 *Bro. P. C. ubi supra.*

Litton v. Robinson, and *Fleming v. Fleming*, mentioned p. 287, are cited in *Garth v. Cotton*, 1 *Ves.* 526; as to which vide the note, *antea* (233.)

E. of DERBY *versus* D. of ATHOL, June 6, 1751.

(*Reg. Lib.* 1750. *A. fol.* 452.)

VOL. II. page 298.—Privilege of peerage.

LEGAL *versus* MILLER, June 10, 1751.

(*Reg. Lib.* 1750. *B. fol.* 523.)

VOL. II. page 299.—Bill for specific performance of a written agreement, and parol evidence read of a variation from it; which being proved, the bill dismissed with costs; the Plaintiff not being allowed to resort to the substantial agreement thus proved on the part of the Defendant.(1) Parol evidence admitted to *resist* a claim, *or rebut* an equity, though inadmissible to establish a demand (2.)

NOTES AND OBSERVATIONS.

(1) SEE also *Mortimer v. Orchard*, 2 *Ves. jun.* 243.

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A Defendant, however, in such a case, may have a decree on the agreement *such as he has proved it to be.* *Fife v. Clayton*, 13 *Ves.* 546; and *Gwynn v. Lethbridge*, 14 *Ves.* 585. Though in general a Plaintiff can only obtain a decree by the express confirmation of the case he states in evidence, or by admission; the case of a suit for tithes is peculiar. Though a plaintiff may fail in establishing his right to tithes in kind, as alleged [348] by his bill, he may yet take advantage of a modus set up by a defendant, and have a decree on that footing. *Vide Carte v. Ball*, 1 *Ves.* 3, *et antea* 4.

(2) *Vide Woollam v. Hearn*, 7 *Ves.* 211; and the cases there cited.

FAWCET *versus* LOWTHER, June 15, 1751.

(*Reg. Lib.* 1750. *A. fol.* 476.)

VOL. II. page 300.—Copyholds.—Particular customs of a manor as to mortgages. Equity of redemption will follow the custom attaching on the legal estate.

Not absolutely determined(1), whether trust estates or equities of redemption in copyholds, *escheat* to the lord.

NOTES AND OBSERVATIONS.

Casborne v. Inglis, cited p. 301, is in 1 *Atk.* 603. *Burgess v. Wheat* cited *ibid.* though not then determined (as stated at the top of the next page) was afterwards decided in 1759. See the whole case, 1 *Blac. Rep.* 123. *Vide also Barclay v. Russell*, 3 *Ves.* 424, and *Williams v. Lord Lonsdale*, *ibid.* 752.

(1) There was a difference of opinion between the Judges in *Burgess v. Wheat*, 1 *Blac. Rep.* 123, &c. both upon the points in question and several that were incidental; and the decision itself seems disapproved. See *per* Lord Thurlow, in *Middleton v. Spicer*, 1 *Bro.* 204, 205. Et *vide Walker v. Denne*, 2 *Ves. jun.* 170, 277, &c.

Though it was determined in *Williams v. Lord Lons-*

dale, 3 Ves. 752, that the plaintiff, the heir of a trustee, had no equity to compel the lord to admit him, even where the premises had been duly surrendered upon the death of the *cestuy qui* trust, without heirs, Mr.

Scriven, in his late perspicuous and very useful [349] work on copyholds, observes, with much weight and acuteness, that in such a case a Court of Law would compel the lord to admit such an heir, agreeably to *The King v. Coggan*, 6 East. 431; and that when so admitted, "we have yet to see what equity the lord would have, paramount such heir." *Scriven on Copyholds*, 293, 294.

Mr. Scriven makes another observation (pp. 284 and 293, notes,) which is worth consideration. Mr. Scriven conceives, that where a person who had purchased a copyhold estate in the name of a trustee, dies intestate and without heirs, a Court of Equity would consider the purchase money as a lien upon the estate, and decree the same to be sold for the benefit of his next of kin. The author of these notes, individually, cannot assent to this opinion, because the money having been invested in an actual purchase of land, must have lost its pecuniary nature, which alone could create any equity whatever in favour of such next of kin. He submits the point as he finds it; and still the great question remains, as to whether there ought to be any escheat at all of trust estates, subject to the cases and observations above referred to.

RAMSDEN *versus* HYLTON, and [350]
HYLTON *versus* BISCOE, *et c contra*,

June 17, 1751.

(Reg. Lib. 1750. B. fol. 651.)

VOL. II. page 304.—General release from a sister to a brother not binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, and the brother having covenanted that he was seised

in fee, contrary to the fact. Satisfaction. The sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deed of release; the brother being a debtor to her to such amount on the face of it. A general release with a particular consideration recited, will be construed according to the particular recital.(1) Settlement after marriage, if a portion paid, is on good consideration, and equal to one made before marriage.(2)

Order made on mortgagees consent to a sale in case of there being delay.

NOTES AND OBSERVATIONS.

(1) SEE also 1 *Ves.* 507.

(2) Vide 2 *Ves.* 18.

Notwithstanding the cases cited in the argument, p. 307, as to the Court's refusing to compel a specific performance of agreements, where the party could not obtain what was his specific object in the contract, the Courts of Equity have gone much further the other way since the periods referred to; and have compelled parties to perform contracts diametrically opposite to their manifest intention. See per Lord *Eldon*, C. 6 *Ves.* 678, &c. &c.

Goring v. Nash, cited p. 309-10, is in 3 *Atk.* 186.

The decree is entered as of the 9th of the following month, from whence it appears, that a sale was directed upon the mortgagees' consent. The Court ordered all deeds, &c. to be produced upon oath before the Master, except such as were in their possession, &c. giving the parties liberty to apply to the Court for a production of the latter, for the satisfaction of a purchaser, in order to make out the title, as occasion should require; and directed, that "in case there should be any extraordinary delay in the sale, any of the mortgagees should be at [351] liberty to apply to the Court for leave to take such remedy on their mortgages respectively, either by ejectment or bill of foreclosure, as they should be advised."

Reg. Lib. ubi supra, and fol. 657.

LEIGH *versus* THOMAS, June 19, 1751.

VOL. II. page 312.—Demurrer.—Want of parties. Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole crew parties.(1)

NOTES AND OBSERVATIONS.

(1) A bill may be brought by some on behalf of themselves and the rest of a crew, for an account of captures, &c. *Good v. Blewit*, 13 *Ves.* 397. In that case the bill was not so framed at the first, and leave was given at the hearing to introduce a statement to that effect. *Moffat v. Farquharson*, 2 *Bro.* 338, is therefore clearly wrong as to this point. So as to other adventures, *Prec. Ch.* 592; *Adair v. N. River Company*, 12 *Ves.* 429, and the cases referred to. Et vide *Lloyd v. Loaring*, 6 *Ves.* 773 to 779.

In respect of the stress laid by the Master of the Rolls in the principal case (p. 313,) upon the familiar instances of creditors and legatees, it is very observable, that Lord *Eldon*, C. states there are strong passages in Lord *Hardwicke's* notes, indicating that the right of a few to represent all the rest, is by no means confined to such instances. See 6 *Ves.* 779.

THOMAS *versus* BRITNELL, [352]

June 20, 1751.

(*Reg. Lib.* 1750. *B. fol.* 635.)

VOL. II. page 313.—Wills construed to charge real estate by implication for the benefit of creditors.(1) Such implication, however, may be afterwards destroyed.

NOTES AND OBSERVATIONS.

THE words used by the testator were "honourably paid immediately after his decease." *Reg. Lib.*

(1) Vide in *E. Godolphin v. Penneck*, 2 *Ves.* 271, 272, *et antea*, ().

Lord Warrington's case, cited page 314, is in 1 *Bro. P. C.* 511, octavo edit. and 4 vol. 90 of the folio edition.

See further as to this case in the note on *E. Godolphin v. Penneck*, *antea* (341).

CHICOT *versus* LEQUESNE, June 21, 1751.

(*Reg. Lib.* 1751. *A. fol.* 90.)

VOL. II. page 315.—Award made by two arbitrators out of three, through the unjust exclusion of the third by one of the others, set aside with costs, to be paid by that person, and the material parties in favour of whom it was made.

NOTES AND OBSERVATIONS.

"It appearing that one of the three arbitrators was, after one of the meetings, refused and excluded by the defendant G. from meeting with him and the other arbitrator, and considering jointly with them of the evidence and merits of the case, though he desired so to do, the Court declared, that the award made ought to be set aside," &c.; and the material defendants, as to the demand in question, to pay the costs of the suit.

[353] Courts of Equity will not interfere in awards where the objections to them might have been equally the subject of jurisdiction in a Court of Law. *Fetherstone v. Cooper*, 9 *Ves.* 67. It is no objection, that a reference to arbitration was not made a Rule of Court till after the award. *Ibid.*

EXEL versus WALLACE, June 22, 1751.

(Reg. Lib. 1750. A. fol. 492.)

VOL. II. page 318.—See this case 2 Ves. 117, et antea (295.)
Appeal from the Rolls on the second point. (1)

NOTES AND OBSERVATIONS.

(1) SEE the marginal note on this point, the observations, and other notes, annexed to the former stage of this cause, *antea* (295.)

Theebridge v. Kilburn, cited p. 319, is in 2 Ves. 233, et *antea* (331.) *Lomax v. Holmden*, cited p. 321, is in 1 Ves. 290, et *antea* (152.) *Lord Teynham v. Webb*, cited *ibid.* is in 2 Ves. 198, et *antea* (325.)

GASON versus WORDSWORTH, July 3, 1751.

(See Reg. Lib. 1750. A. fol. 641.)

VOL. II. page 325.—See S. C. 2 Ves. 336, et *postea* 357.
Where it is quite clear that an examination in chief is morally impossible, there may be a publication of depositions taken *de bene esse*.

NOTES AND OBSERVATIONS.

SEE 2 Ves. 336, et *postea* (357,) where the Lord C. made the order as prayed, upon the commission having been returned unexecuted, and no possible likelihood of an execution of it afterwards.

FLOWER versus HERBERT, July 4, 1751. [354]

(Reg. Lib. 1750. A. fol. 518.)

VOL. II. page 326.—Injunction until hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission.

ATTORNEY GENERAL *versus* MIDDLETON,

July 4, 1751.

(*Reg. Lib.* 1750. *A. fol.* 484.)

VOL. II. page 327.—A free school founded by charter, with proper powers, must be regulated in the first instance by the charter, not by application to a Court of Equity. (1)

No formal words necessary for the appointment of a visitor, (2) but the visitatorial power not to be extended. (3)

The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the Court thinks proper for its interference at all, (4) and the information here being improper, was dismissed with costs.

NOTES AND OBSERVATIONS.

(1) SEE *Attorney General v. The Foundling Hospital*, 2 *Ves.* jun. 42, and 4 *Bro.* 165; *Attorney General v. Smart*; and *Attorney General v. Talbot*, 1 *Ves.* 72, 78, *et antea* (53) and (57); and *Attorney General v. E. of Clarendon*, 17 *Ves.* 491.

(2) See 1 *Ves.* 78; 15 *Ves.* 315; and 17 *Ves.* 491, &c.

(3) See 1 *Ves.* 475.

(4) See *Attorney General v. Parker*, and *Attorney General v. Smart*, 1 *Ves.* 43, 72, and *ibid.* 418, *et antea* (37) and (53.)

[355] BLUNT *versus* CUMYNS, July 8, 1751.

(*Reg. Lib.* 1750. *A. fol.* 641.)

VOL. II. page 331.—Thirty shares in a privateer remaining unsubscribed for, and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since if there had been a loss, they could only have been answerable to the amount of their own shares.

Not dismissed with costs, as this act of the managers might give occasion to litigate the matter.

In all mercantile contracts and adventures, parol evidence of usage in such cases allowed.

Parol evidence, in the above case, as to usage and custom on the written articles taken on behalf of the plaintiffs, but not being read by them at the hearing, allowed to be called for and used by the defendants.

WORSLEY *versus* E. OF GRANVILLE,

July 9, 1751.

(*Reg. Lib.* 1750. *B. fol.* 600, entered "*Worsley v. Worsley.*")

VOL. II. page 391.—Portions—Marriage settlement on husband and wife for life, and trust term if no issue male, or if all should die without issue male before 21 years, to raise portions for daughters, &c. A son attained 21, but died in father's lifetime without issue male. The portions not raiseable.

Where a term for securing portions has been misplaced in a settlement, &c. so as to be defeasible at Law, it will be rectified in Equity.

NOTES AND OBSERVATIONS.

SEE p. 331, line 3 from the bottom. The trust was "if there should be one, and no more, &c.; if two or more, then 12,000*l.*" &c. *R. L.*

See same page, last line. After the words "twenty-one," the declaration ran thus: "or if such person, &c. to whom the real estate of inheritance expectant, &c. appertained, should pay to the daughter or daughters, &c. the said respective portions, or so much as should not before that time be raised out of the premises, &c. &c. then the term should determine," &c. [356] *R. L.*

The case alluded to p. 333-4, seems to be *Uvedale v. Halfpenny*, 2 *P. W.* 151. See also the cases in Mr. Cox's note. *Hylton v. Biscoe*, mentioned p. 335, is in 2 *Ves.* 304, *et antea* (350.)

The Court has often leant against raising portions out of a reversionary term. See *Lord Clinton v. Seymour*, 4

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Ves. 440, 460; with Mr. Cox's note to *Butler v. Duncomb*, 1 *P. W.* 452, and the note to 2 *Ves.* jun. 481. See vide 6 *Ves.* 379, 380, where Lord Eldon, C. disapproves of the Court's "being eager to lay hold of circumstances" (4 *Ves.* 460,) or "of small grounds" in such cases (1 *Atk.* 549,) since it ought to be wholly impartial.

AYLET *versus* EASY, July 11, 1751.

(*Reg Lib.* 1750. *A.* fol. 482.)

VOL. II. page 336.—After an original bill proceeded in, it is not a motion of course to enlarge publication on a cross bill; but notice must be given, &c.

NOTES AND OBSERVATIONS.

(1) SEE 1 *Atk.* 21 and 291, where the application is regular.

The matter, in the principal case, came on upon two motions; the first by the plaintiffs in the original cause to discharge an order obtained as of course by the defendants, the plaintiffs in the cross cause; whereby publication in the original cause was ordered to be enlarged, until a fortnight after the plaintiffs in the original cause should have fully answered the cross bill: the [357] other was on the part of the defendants in the original cause, upon notice that publication in that cause might be enlarged, until the first seal after the next Michaelmas Term; and that the original cause might be adjourned over to the next term. The Court discharged the former order, and acceded to the latter application. Vide 16 *Ves.* 93 and 133.

GASON *versus* WORDSWORTH, July 11, 1751.

(Reg. Lib. 1750. A. fol. 641.)

VOL. II. page 336.—Vide S. C. 2 Ves. 325, et antea, 353.

A foreign government having repeatedly refused to permit the execution of a commission to examine witnesses in its States, agreeably to the indispensable rules of the Courts of Equity in England; publication was ordered of depositions, which had been taken *de bene esse*.

NOTES AND OBSERVATIONS.

VIDE S. C. 2 Ves. 325, et antea (353).

It appears from *R. L.* that the Government in Sweden had persisted in its refusal, though application had been made to the King and Senate; and that the commission had been returned since that time; so “that there was no probability of executing any future commission.”

BISHOP OF SODOR AND MAN *versus* EARL OF
DERBY, and EARL OF DERBY *versus*
DUKE OF ATHOL.

(Reg. Lib. 1750. A. fol. 581.)

VOL. II. page 337.—The statute of wills, *et de donis conditionalibus*, do not extend to the Isle of Man. (1) That island made unalienable by a private act of Parliament against heirs general, on failure of issue male.

NOTES AND OBSERVATIONS.

(1) SEE the plea filed in the second mentioned cause, and the Lord Chancellor's observations on some points relative to the Isle of Man. 1 Ves. 202, [358] 204.

On the present occasion, there were not only directions for the account, mentioned towards the bottom of page 357, but the Master was to compute the clear annual value of the rectory, tithes, &c. for the time to come, from

the time to which "the above mentioned account was to be carried down, [making proper deductions for the reserved rents;] and the value so computed was to be paid by the Earl of *Derby*, and any other persons claiming the premises comprised in the deed of collateral security to the plaintiffs, the Bishops, &c. and to their successors, &c. yearly, and every year, or at the end of six months after the determination of every year; to be respectively disposed of, distributed, and paid by them, from time to time, according to the trusts mentioned and declared in and by the said grant or demise, &c. And in case default should be made by the Earl of *Derby*, or any person who should claim under him, as aforesaid, in making any of such annual payments, the plaintiffs in the original cause were to be at liberty to apply to the Court, from time to time, for further directions to enforce the payment thereof, as occasion should require." *Reg. Lib. fol. 584.*

[359] *KNIGHT versus DUPLESSIS, July 20, 1751.*

(*Reg. Lib. 1750. A. fol. 514.*)

VOL. II. page 360.—S. C. 2 Ves. 288, 538, 555, and 1 Bro. P. C. 415, octavo edition.

Receiver not appointed on behalf of heir at law, as against a devisee. The heir must try the question at law.(1) Guardian or trustee for an infant, who had a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will still be enjoined.

It seems that although an alien cannot hold lands for his own benefit, he may take an estate by devise, as well as by grant, conveyance, &c.(2)

NOTES AND OBSERVATIONS.

(1) SEE, however, 3 *Atk.* 17.

A receiver appointed against a legal estate, under a conveyance, upon a strong ground of suspicion as to abused

confidence. *Huguenin v. Basely*, 13 *Ves.* 105. Vide also in *Lloyd v. Passingham*, 16 *Ves.* 59.

(2) See page 362 of the report.

BARWELL versus PARKER, July 22, 1751.

(*Reg. Lib.* 1750. *A. fol.* 601.)

VOL. II. page 363.—Interest—Under a trust term, by deed, to pay debts and legacies, held, that simple contract debts did not carry interest. So likewise as to a will. Contra, however, if by any deed in the nature of a specialty, from whence an intention can be inferred, as if the debts be annexed by way of schedule. Scrivener, &c. receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest. Balance of an account stated by such scrivener, &c. will carry interest. (1)

NOTES AND OBSERVATIONS.

[In 1 *Brown*, 41, money raised by deed on land, and vested in trustees, to pay debts, was held not to change the nature of simple contract debts, and therefore they were not to bear interest. But if creditors had filed bills, and obtained separate reports, from that time they would have carried interest. Note to the third edition.]

See the report.

(1) An executor who had been directed by the will not to derive advantage from money in his hands without accounting for legal interest, to accumulate for the *cestuis qui trusts*, ordered to account for interest at 5 *per cent.* with compound interest on half yearly rests. *Raphael v. Boehm*, 11 *Ves.* 92. Affirmed on the re-hearing, 13 *Ves.* 407, 590.

As to various other questions of interest, see *Creuze v. Hunter*, 2 *Ves.* jun. 157, &c.; *D. Bedford v. Coke*, 2 *Ves.* 117, *et antea*, (293); *Bickham v. Cross*, 2 *Ves.* 471, *et postea*; and *E. of Bath v. E. of Bedford*, *ibid.* 587, *et postea*.

As to the case of *Car v. Countess of Burlington*, particularly mentioned p. 364, the decree in *Reg. Lib.* is contrary to the declaration stated in *P. W.*'s report of it. See Mr. Cox's note, 1 *P. W.* 229.

JONES *versus* CLOUGH, July 22, 1751.

(*Reg. Lib.* 1750. *A.* fol. 624.)

VOL. II. page 365.—Query the accuracy of the report in this case. (1) The marginal note there is as follows: "Father tenant for life, and two sons, article to charge [an estate] with a sum for younger children after the father's death, as he by will, duly executed, should direct. He directs by will with two witnesses only." A good execution of the power, nothing passing from the father. Otherwise if by owner of the estate. (1)

NOTES AND OBSERVATIONS.

(1) THE author of these notes ventures to doubt the propriety of the decision in a case thus circumstanced, considering the strength of the words "duly executed," which he cannot avoid thinking a Court must construe with reference to the statute of frauds. If it should be urged, that the Court would supply a defect in the execution of the powers in favour of such objects as younger children, he would submit that it is putting the
[361] case upon a totally different ground than is argued upon by the Master of the Rolls in the report; and that such a position is in fact inconsistent with it, inasmuch as his Honour considered the will had no defect to be supplied. However this may be, it is very singular that the point here reported, is so far from being raised by the pleadings (as they appear from the Registrar's book,) that the defendant *Thomas* even admits the will, according to the statement in the bill, of its "being duly executed;" and expressly admits that the premises are chargeable with the 300*l.* under the articles.

The bill was brought by a mortgagee, claiming under a security executed by *John*, after having suffered a recovery of part of the estates under a conveyance to him (the plaintiff) of the shares of the younger children (excepting the share of *Thomas*) against *Thomas*, and *Richard*, one of the younger children, who merely claimed to be entitled, under the will of *John*, to the equity of redemption of such part of the estates whereof *John* had suffered a recovery. "After long debate" the decree directed an account of what was due to the mortgagee, &c.; and by consent of *Richard* (the devisee of *John*,) that the Shropshire estate should be sold, &c. And it was declared (*inter alia*) that the sum of 299*l.* (advanced by the plaintiff to the younger children,) with interest and costs, ought to be raised out of the Shropshire and Montgomeryshire estates, rateably, and in proportion to their respective values, &c.; which was ordered accordingly. *Vide Reg. Lib.*

It is observable further, that the Master of the [362] Rolls, in the hypothetical case put in p. 367, does not carry it to the proper extent, so as to render it parallel with that before the Court, which it was to illustrate.

ASHBY *versus* BAILLIE, July 24, 1751.

(*Reg. Lib.* 1750. *A. fol.* 629.)

VOL. II. page 368.—Real assets, followed under administration bonds, by legatees—creditors have no such right.

NOTES AND OBSERVATIONS.

Mary Pocock was not *W. Barnsley's* executrix, as stated in the report. His executors renounced, *Mary Pocock* died intestate. *William Pocock*, the brother of the plaintiff *Jane*, took out administration to his mother *Mary Pocock*, and to *W. Barnsley*, with his will annexed.

Sarah, the devisee of *William Pocock*, was not his sister, as mentioned in the report, but his wife.

The covenant of *Mary Pocock* was by deed poll in the life-time of *William Barnsley*, "reciting that it had been thus given by his will with intent to advance the plaintiff *Jane* in marriage, if she married with the consent of the said *Mary Pocock*, her mother, and of *William Pocock*, her brother, or the survivor; and whereby the said *M. P.* by *W. Barnsley's* directions, promised and agreed with him, his executors, &c. that if she survived him, the 3000*l.* so given her for the plaintiff, should be paid to her, if she married with such consent." *R. L.*

[363] *William* having refused his consent to a suitable marriage for his sister, the plaintiff *Jane*, when it was approved by all her other friends, a suit was instituted by her against him: in which, the Master having certified his opinion in favour of the match, it was ordered, that upon the marriage of the person in question with the plaintiff, and his making a settlement, which had been proposed, the plaintiff's brother *William* should pay the sum in question. *William* died without paying it. *R. L.* As to the rest, see the report. Various other proceedings are stated in *R. L.* which are not material to be noticed here.

BISHOP *versus* CHURCH, *June 25, 1751.*

(*Reg. Lib. 1750. A. fol. 597.*)

VOL. II. page 371.—Vide S. C. 2 Ves. 100, et antea (288).
 Relief in Equity, on an instrument which had been drawn by mistake as a joint bond, and in respect of which the remedy at law was gone; the nature of the transaction implying the obligee's right to demand the consideration from the parties severally.⁽¹⁾
 The solvent obligor being dead, the demand available in equity, both against his executor and heir, though the real estate was liable only in default of the personalty. Though a legal obliga-

tion, and penalty may have become void at law, the condition of it is considered in equity, as an agreement to pay, regard being had to the nature of the consideration.(2)

NOTES AND OBSERVATIONS.

(1) SEE *per* Lord Eldon, C. 10 Ves. 227, and the cases referred to in the former notes on the principal case, *antea* (288).

It must, however, be observed, that equity will not relieve in such cases, where the obligation, or covenant, is from persons in the nature of sureties; or where the consideration is not that of a sum of money advanced, but arises solely on the face of the instrument. This was lately determined in *Sumner v. Powell*, and others, Rolls, Nov. 19, 1816, in which Sir William Grant, M. R. referred to the case of *Devaynes v. Noble*. See 2 *Merivale's Reports* () and ().

(2) Vide the preceding note. *Probat v. Clif-* [364]
ford, and *Welsh v. Harvey*, mentioned p. 373,
are also cited 2 Ves. 102.

PRYSE *versus* LLOYD, July 26, 1751.

(*Reg. Lib.* 1750. B. fol. 644.)

VOL. II. page 372.—Vide S. C. 1 Ves. 503, et *antea* (310).

PITCAIRNE *versus* OGBOURNE, July 29, 1751.

(*Reg. Lib.* 1750. B. fol. 634.)

VOL. II. page 375.—Parol evidence admitted to show, that though a bond, on marriage, was for 150*l.* per annum, yet the agreement was for 100*l.* The bill dismissed, as founded on a private agreement, calculated to deceive a material party. It was dismissed, however, without costs.

NOTES AND OBSERVATIONS.

THE statement of the case is continued at page 377; and it agrees with *Reg. Lib.*

It appears that the defendant lived wholly with her uncle; see p. 379.

Walker v. Walker, cited p. 375, is in 2 *Atk.* 99; and see the note to 3 *Ves.* 58.

The case of *S. S. Company v. Oliff*, cited page 376, is also cited 1 vol. 318, where it is called *D'Olipphant v. S. S. Company*.

MARQUIS *versus* MARCHIONESS OF ANANDALE,⁽¹⁾

[365] July 29, 1751.

(*Reg. Lib.* 1750. B. fol. 612.)

VOL. II. page 381.—A sum devised to be laid out in lands in England, in trust for A. with remainders over, was by act of Parliament, secured on A.'s estate in Scotland, during his minority. A. attained 21, and became a lunatic. Held it might be called in, and laid out, pursuant to the trust, and that it was to be considered as if it were a real estate in England; the interest thereon, however, to be considered as personal estate in England.⁽²⁾

The Master was ordered to settle a rateable proportion for the lunatic's maintenance, and his debts, between the real and personal estate in England and those in Scotland respectively.⁽³⁾ Another sum in the Exchequer in England, arising from the sale of heritable jurisdiction in Scotland, considered as real estate in Scotland.

NOTES AND OBSERVATIONS.

SEE also another branch of the *Anandale* cause, *Ambler* 89, and *Bempde v. Johnstone*, 3 *Ves.* 198.

Thorne v. Watkins, cited p. 383, is in 2 *Ves.* 35, *et antea* (265.)

Lord *Loughborough*, C. in *Oxenden v. Lord Compton*, doubted the accuracy of Mr. *Vesey's* note at the top of p. 384; observing there was nothing which called for such a

dictum. Vide 2 *Ves. jun.* 76. His Lordship, in that case, determined that the produce of timber cut down and sold by order, on a report "that it would be for the lunatic's benefit," was personal assets. See 2 *Ves. jun.* 69, and also *ibid.* 261.

(2) It was declared, "that the principal money placed out on the said adjudications and securities, being part of the testator *V. B.*'s trust estate, is to be considered as part of the real estate of the said Marquis of *A.* in England; and that the interest arising upon the said securities is to be considered as part of the personal estate of the said Marquis of *A.* in England." *R. L.*

(3) The report is inaccurate towards the top of p. 387, where it states that the Master was to make the apportionment between the two personal estates in England and Scotland. On the contrary, the [366] Court declared, "that the burthen and expense [of the maintenance and debts] ought to be borne in a rateable proportion between his real and personal estate in England, and his real and personal estate in Scotland, regard being had to the respective incomes and produce of each estate." The Master was directed "to inquire into and settle the proportions accordingly, &c." *R. L. fol.* 613.

Ex parte BAX, July 30, 1751.

VOL. II. page 388.—Exceptions to a certificate from Commissioners of Bankrupt. —Jurisdiction of Commissioners of Bankrupt in matters referred to them. —When accounts, &c. are referred to Commissioners of Bankrupt, their jurisdiction and proceedings are analogous to accounts taken before a Master in a suit in Equity, and also to that of Auditors under the old action of account at law. In the case of exceptions to the report of a Master, or the certificate of Commissioners, they must be founded on objections made before the Master or Commissioners. If the Master, &c. varies his report, &c. on the objections, the other party may except as to such parts, though the

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exceptant be not strictly warranted by the objections. Commissioners, as well as a Master, may proceed *ex parte*, if the parties will not attend.

HARRISON *versus* SOUTHCOTE, July 31, 1751.

(*Reg. Lib.* 1750. *A. fol.* 590, 646.)

VOL. II. page 389.—S. G. 1 Atk. 528. Plea allowed as to discovery, whether one from whom the defendant purchased was not a Papist.(1)

NOTES AND OBSERVATIONS.

THE defendants put in separate pleas.

(1) Vide *Brownsword v. Edwards*, 2 *Ves.* 248, *et antea* (334.) See also 15 *Ves.* 337.

[367] LORD MONTAGUE *versus* DUDMAN, July 31, 1751.

VOL. II. page 396.

NOTES AND OBSERVATIONS.

THE case of *The Lord Mayor of York v. Pilkington*, cited p. 397, is in 1 *Atk.* 282, and 2 *Atk.* 302.

BEARD *versus* E. POWIS, August 3, 1751.

(*Reg. Lib.* 1750. *A. fol.* 508.)

VOL. II. page 399.—Though a cause be abated, money may be ordered to be paid out of Court without reviving the cause, upon the consent of all the parties actually interested.(1)

NOTES AND OBSERVATIONS.

(1) THIS may be a matter of convenience, and attended with no prejudice or risk in some cases; but the Court might in others be led to overlook the interest of material parties, if such applications were very common.

In the principal case, the Earl of *Powis*, the petitioner, stated himself to be entitled, under settlement and a private act of Parliament, to certain sums to be raised out of a 500 years term, and a sum in Old South Sea Stock, which had been chargeable with an annuity of 700*l.* to the plaintiff *Lady Beard*, but which the petitioner had since purchased; and after further stating that the trustees had theretofore raised some objections, and that an end might now be put to all the matters sought by the bill, so that it would be unnecessary to bring the suit to an hearing, he prayed by his petition, that he might be declared entitled, &c. and that the trustees might raise [368] the requisite sums by sale or mortgage of the term, and that all parties might be paid their costs out of the estate of the late Marquis of *Powis*. Whereupon, &c. upon hearing the said petition, the said act of Parliament, &c. the counsel for the trustees not opposing, &c.; and the plaintiffs, Mr. *J. Beard* and the Lady *Henrietta* his wife, being present in Court, and examined, and declaring they have received satisfaction for the annuity of 700*l.*, and consenting, &c. His Lordship declared that the said several sums, &c. did belong to the petitioner for his own use. And the defendants, the trustees, not opposing it, the Accountant General was ordered to transfer to the petitioner the O. S. Sea Annuities, and that the defendants, the trustees, should be at liberty* to pay to him the other sums, when the same should be raised out of the 500 years term before mentioned. *Reg. Lib.*

WELFORD *versus* LIDDEL, August 3, 1751.

(*Reg. Lib.* 1750. B. fol. 651.)

VOL. II. page 400.—Plea good in part, and in part disallowed. Plea of the statute of limitations, not to the general account pray-

* See the end of the Judgment, page 400 of the Report.

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ed, but to an account between plaintiff and his father in his lifetime, allowed, with an exception of one article.(1)
As to the plea of the statute on merchants accounts.(2)

NOTES AND OBSERVATIONS.

(1) BESIDES that part of the plea and averment stated in the report, it proceeded thus: "And further, that they did not within six years before filing the bill, nor within six years before they were served with process to appear and answer thereto, ever promise and agree to [369] pay, or satisfy the plaintiff, any money for any of the matters, &c. charged, or alleged by the bill, &c.

The plea was allowed, "as to all dealings and transactions between the plaintiff and *J. W.* his father deceased, except as to the bond charged in the plaintiff's bill to have been entered into by *Watson* to the plaintiff, and the consideration thereof, and all circumstances relating thereto." And as to that part, the plea was over-ruled. *R. L.*

(2) See page 400, et vide *Jones v. Pengree*, 6 *Ves.* 580.

Ex parte SOUTHCOT, August 6, 1751.

VOL. II. page 401.—Commission of lunacy to inquire as to the lunacy of a person abroad, was directed where the party's mansion and more important estates lay.

NOTES AND OBSERVATIONS.

Roberts's case, mentioned p. 402, is in 3 *Atk.* 5, 308.
Vide 2 *Strange* 1208.

LORD DONEGAL'S CASE.

VOL. II. page 407.—In this case a commission of lunacy was refused in respect of a person of merely weak understanding, and imbecile mind.(1)

As to idiots in the strict sense of the word.(2)

NOTES AND OBSERVATIONS.

(1) THERE has been an alteration since Lord *Hardwicke's* time; and commissions in the nature of those of lunacy, are now applied to cases, where there is such an imbecility of mind as renders a person incompetent to the management of his affairs, or liable to [370] be imposed on. See in *Ridgeway v. Darwin*, 8 *Ves.* 65, 66. *Ex parte Cranmer*, 12 *Ves.* 445, 447, &c. The proper return to such a commission is, "that the party is of unsound mind; so that he is not sufficient for the government of himself," &c.; and a return, "that he is so debilitated as to be incapable of the general management," &c. being too loose, was quashed, and a new commission issued, 12 *Ves.* 445.

(2) See page 408.—The word "idiot," is a technical one, well known in our ancient law, and confined to the precise case of a person "*fatuus a nativitate*." The words of the statute 17 *Ed.* II. c. 9. are, "*Rex habebit custodiam terrarum fatuorum naturalium*;" whereby (says *Cowell's* interpreter) it appears, an idiot must be "*fatuus a nativitate*." "For if he was ever wise, or became a fool by chance, &c. the King shall not have the custody of him." There are, however, some form of writs directing inquiries, "an *idiot a et fatuus a nativitate extitit*," see 12 *Ves.* 451, note.

PRIME *versus* STEBBING, July 1, 1752.

(*Reg. Lib.* 1751. B. fol. 569.)

VOL. II. page 409.—Covenant in marriage articles that lands settled were of a certain value, which they were not: husband, by will "confirms the articles, and also gives his wife all his lands in A. B. for life." Held, not to be a question of satisfaction, or part performance,(1) but of construction; and that the wife was entitled to both interests under the intent thus collected. Further covenant from the husband, "inasmuch as he was to be absolutely entitled to all the wife's personal estate,"

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to settle "in respect of any sum that might come to her afterwards, after the rate of 100*l.* per annum on her for life, for every 1000*l.*; and, upon certain contingencies, that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a decree for 400*l.* of the wife's money, but did not receive it: held, she was entitled to a settlement according to that proportion; and the contingencies having happened, to the moiety likewise of all sums received, including the 400*l.*; since the husband might have received it.

NOTES AND OBSERVATIONS.

(1) *VIDE Lee v. D'Aranda*, 1 *Ves.* 1, *et antea*, (1) *et Barret v. Beckford*, 1 *Ves.* 519, *et antea* (219).

[371] SCRAFTON *versus* QUINCEY, July 2, 1752.

(*Reg. Lib.* 1751. *B. fol.* 572.)

VOL. II. page 413.—Deed of appointment of lands in a register county pursuant to a power in a former deed which was not registered, (1) postponed to a mortgage made subsequent to it, and registered before it.

NOTES AND OBSERVATIONS.

(1) **THE** defendant, who claimed under the deed of appointment, admitted that the prior deed of 1742, which created the power, was not registered, and that the deed of appointment was not registered until 1748 [which was two years after the registry of the plaintiff's mortgage.]

ANONYMOUS, July 4, 1752.

VOL. II. page 414.—Where a question is one determinable at law, and no obstacle or inconvenience in trying it, a Court of Equity will not interpose by injunction. (1) In this case an injunction to stay the use of a market was refused. A right cannot be established against all persons under a mere bill for an injunction. (2)

NOTES AND OBSERVATIONS.

(1) SEE *Hanson v. Gardiner*, 7 *Ves.* 305, 309, &c.

(2) Vide page 414, 415, and 7 *Ves.* 309.

LEWIN *versus* LEWIN, July 6, 1752. [372]

(*Reg. Lib.* 1751. *B. fol.* 473.)

VOL. II. page 415.—Construction of a will. Annuity by will to a wife, otherwise unprovided for; and sums for children's maintenance. On a deficiency of assets; held, on the intention of the testator, that they should not abate in proportion with the general legacies.(1)

NOTES AND OBSERVATIONS.

BESIDES what is stated in the report as to the bequests in favour of the wife; the testator, just before the gift of the general legacies, directed that "in case the plaintiff should survive the children he should leave, or the child she should be ensient with at his decease, then his executors should pay to her, during life, an additional sum of 40*l.* per annum, to be paid in the same manner as the 120*l.* was thereby directed and made payable."

The Court declared, "that the plaintiff was entitled to this contingent annuity, as well as to the annuity above mentioned, in preference to the other legatees; and that the sums directed for maintenance of the children had a preference likewise." *R. L.*

See per Lord *Hardwicke* further as to this case in 2 *Ves.* 421.

The determination alluded to by Lord *Hardwicke*, p. 417, as to the abatement of an annuity, seems *Hume v. Edwards*, 3 *Atk.* 693. *Brown v. Allen*, mentioned in same page, is in 1 *Vern.* 31.

As to the doubt expressed by Lord *Hardwicke*, and the case supposed, at the bottom of p. 417, see in *Blower v.*

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Morret, 2 *Ves.* 420, 421, and which was determined within a few days afterwards. See the next page.

[373] *RUDSTONE versus ANDERSON*,

July 7, 1752.

(*Reg. Lib.* 1751. *B. fol.* 604.)

VOL. II. page 418.—Revocation of will. After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease, held to amount to a revocation; so that a republication was necessary.(1)

NOTES AND OBSERVATIONS.

(1) SEE also 2 *Bro.* 291, and 1 *Bro.* 260.

Where, however, a testator had bequeathed leaseholds for all the residue of his term, and interest therein at his decease, and suffered the term to expire, but continued to hold, and paid half a year's rent as tenant by the year, a subsequent lease obtained by his executrix was held to be subject to the uses of his will. *James v. Deane*, 11 *Ves.* 383, *quod vide*.

Abney v. Miller, cited page 418, is in 2 *Atk.* 593. See *Amb.* 573, and *James v. Deane*, 11 *Ves.* 383.

Carte v. Carte, mentioned p. 419, is in 3 *Atk.* 174, and *Amb.* 28.

BLOWER versus MORRET, *July 10, 1752.*

(*Reg. Lib.* 1751. *A. fol.* 554.)

VOL. II. page 420.—Pecuniary legacies abate in proportion, notwithstanding a direction in the will that they are to be paid "in the first place,"(1) or a direction as to the time of payment. If, however, an intention that any legacies are to be paid in full is to be collected, or reasonably inferred, it will be otherwise, as where a legacy is meant as a purchase of dower to which the party is entitled.(2)

NOTES AND OBSERVATIONS.

(1) *VIDE Lewin v. Lewin*, 2 *Ves.* 415, and the bottom of page 417, *et antea* (372).

(2) An inquiry was directed, as to whether the wife were entitled to dower; and a declaration made agreeably to what is stated at the end of the report.

NICHOLS *versus* GOULD, July 10, 1752. [374]

(*Reg. Lib.* 1751. *B. fol.* 523.)

VOL. II. page 422.—Purchase of a reversion not set aside merely for undervalue, there being no fraud.(1)

NOTES AND OBSERVATIONS.

(1) **THOUGH** mere inadequacy is no ground of relief, where the parties during the treaty and arrangement stood on equal terms, the Courts are properly very jealous in scrutinising all transactions of the kind; and they seem of late years to have leaned more particularly against them; especially in the case of expectant heirs.

Vide antea (297) in the notes to *E. Chesterfield v. Jansen*. *Evans v. Chesshire*, mentioned *ibid.* and reported p. 300, together with *Peacock v. Evans*, *et e contra*, 16 *Ves.* 512. See also in *Bowes v. Heaps*, 3 *Ves. & B.* 117.

RATTRAY *versus* DARLEY, July 11, 1752.

(*Reg. Lib.* 1751. *B. fol.* 546.)

VOL. II. page 424.—Agreement. The defendant having entered into a written agreement “to leave by his will,” to a woman he had lived with, the value of the rents he had received from her estate, subject to specified deductions; an account was forthwith directed, with a declaration that the balance in her favour was to be considered as a debt from the defendant, payable after his death.(1)

NOTES AND OBSERVATIONS.

(1) THE report is inaccurate in stating that the agreement was the subject of the cross bill, and relied on by the plaintiff in the cross bill, who was the defendant in the original suit. In point of fact it was the subject and foundation of the original bill. The defendant, by his cross bill, attempted only to set up a kind of discharge, release, and offer to account by *Anne G.* the plaintiff in the original suit.

[375] The agreement, as set forth by the original bill, was stated thereby to have been given by the defendant to the plaintiff *Anne* in writing, in the terms following: "I do hereby agree to leave Mrs. *A. G.* by my last will and testament, the value of the rents I have received of her estate, deducting thereout what she stood indebted to me for what I paid for her before this time, except clothes. And I do hereby acknowledge that I have this day received of her the sum of 5*l.* in full of all accounts and demands to this day, whatsoever; as witness my hand this 2d day of October, 1749, T. DARLEY." As to the original bill, the Court (*inter alia*) directed an inquiry, "whether, on the last mentioned day, being the date of the agreement entered into by the defendant with the plaintiff *Anne*, she was indebted to him for any money which he had paid for her before that time, except for her maintenance, or that of her children, or for the use of the family, or for clothes, or for presents; and if so, the defendant was to be allowed the same in account." And it was declared, "that what should be coming on the balance of that account, was to be considered as a debt from the defendant to the plaintiff *Anne*, to be paid her after his death." And after his death, the plaintiff, or her representatives, were to be at liberty to apply. The defendant was to pay the costs up to the hearing, and his cross bill was dismissed with costs.

ATTORNEY GENERAL *versus* BRERETON,
and BRERETON *versus* TAMBERLAINE,

July 14, 1752.

(*Reg. Lib.* 1751. *A.* fol. 577.)

VOL. II. page 425.—Directions of the Court on establishing a right to hold a perpetual curacy, and as to the nomination thereto by the patron. The question whether a perpetual curacy or no may be judged of by three concurring circumstances. First, whether there are parochial rights belonging to the chapel in question; secondly, with reference to the rights of the inhabitants within the district; and thirdly, as to the rights and dues belonging to the curate—Such a curate not removable at pleasure. Presentation to a church, or nomination to a perpetual curacy may be by parol. A bill is the proper mode of establishing a right to a perpetual curacy, &c. &c. and not on information in the name of the Attorney General, except in the case of charities. Augmentations of vicarages, &c. form such an exception. Costs.

NOTES AND OBSERVATIONS.

SEE p. 429.—The order made was as follows: “Whereupon, &c. And the Court having proposed to the parties in these causes, whether any of them are desirous to try any of the questions arising in these causes at law; and the counsel for all parties declining to try the same at law; his Lordship doth declare that the curacy or chapel at Flint is a perpetual curacy, and that the nomination of a curate to the said chapel belongs to the Vicar of the parish of Worthop for the time being, and his successors in that vicarage; and that the curate so nominated, being licensed by the Bishop of St. Asaph, for the time being, is not removable at the pleasure of the Vicar of W. but has a right to hold such curacy for such time and in such manner as other perpetual curates have by law a right to hold their curacies: and therefore upon the original information doth order and decree, that the right of the relator *R. T.* to the said curacy, with its appurtenants, and to all revenues,

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profits, and duties thereunto belonging, or therewith usually enjoyed, be established according to the declaration aforesaid." The charitable benefaction of [377] 20*l. per annum* to the curate was also established; and possession of the chapel was ordered to be delivered to the relator; an account of the profits directed, &c. The right of the Vicar, the plaintiff in the cross cause, and of his successors, to nominate a curate of the said perpetual curacy of F. on all vacancies thereof was established. The cross bill was dismissed, as to all other matters. Two of the defendants were to be paid their costs, but none were given on either side, as between the other parties. *Reg. Lib. fol. 578.*

TREVANION *versus* VIVIAN, July 14, 1752.

(No Entry.)

VOL. II. page 430.—Under a bequest of the residue of a personal estate to A. if he attain 21, the profits will accumulate. (1)

NOTES AND OBSERVATIONS.

(1) SEE also *Bullock v. Stones*, 2 *Ves.* 521, *et postea*, and 2 *Roper on Leg.* 205.

Green v. Ekins, cited p. 430, is in 2 *Atk.* 473. *Butler v. Butler*, cited *ibid.* is in 3 *Atk.* 58.

HELE *versus* GILBERT, July 16, 1752.

(*Reg. Lib.* 1751. *A. fol.* 584.)

VOL. II. page 430.—Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due." China held to pass under a bequest of "furniture." (1) Storetea contra.

NOTES AND OBSERVATIONS.

(1) As to what will, or not, pass under a bequest of "furniture," or "household furniture," see 2 *Roper on Leg.* 249, &c. and especially *Le Farrant v. Spencer*, 1 *Ves.* 97, *et antea* (68), and *Stapleton v. Conway*, *antea* (185); notes to 1 *Vesey*, 427-8.

The testator had in his house some store-tea. This was ordered to be delivered up to his residuary legatee. *R. L.* So in *Porter v. Tournay*, 3 *Ves.* 311, wine and books held not to pass.

LEWIS *versus* NANGLE, (1), July 17, 1752.

VOL. II. page 431.—Vide *Ambler*, 150. Parties.—On a bill by devisee to redeem, the heir at law an unnecessary party.

NOTES AND OBSERVATIONS.

(1) SEE this case *Ambl.* 150. Et vide *Clinton v. Hooper*, 1 *Ves.* jun. 173.

WARD *versus* TURNER, July 20, 1752.

(No Entry.)

VOL. II. page 431.—In the case of *donationes mortis causa*, an actual delivery is indispensable to vest the property, if the subject matter is capable of delivery. If it be not so, there must be a delivery of what is equivalent to it at law. (1) In the case of stock, &c. delivery of the receipts, &c. not sufficient to constitute such a gift, though strong evidence of the intent. Formerly, there could be no action at law on a bond without a profert.

NOTES AND OBSERVATIONS.

(1) As to *donationes mortis causa*, see 1 *Roper on Leg.* 1, 2, &c.; and particularly *Tate v. Hilbert*, 2 *Ves.* jun. 111; and *Snelgrove v. Bailey*, 3 *Atk.* 214.

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A similar rule prevails also as to gifts *inter vivos*. Vide in *Tate v. Hilbert*, 2 *Ves. jun.* 111, &c.; *Antrobus v. Smith*, 12 *Ves.* 39, &c. See also in *Tomkyns v. Ladbrooke*, 2 *Ves.* 591, 594, 595, *et postea*.

Bailey v. Snelgrove, cited p. 432 and 431, is in 3 *Atk.* 214. *Ryal v. Rowles*, referred to p. 436, is in [379] 1 *Ves.* 348. *Richards v. Symes*, cited *ibid.* is in 2 *Atk.* 319.

See page 442; *et vide* the notes, *antea* (163), to *Walmsley v. Child*, 1 *Ves.* 341, 345, &c.; and those *antea* (284) on the case of *Askew v. The Poulterers' Company*, 2 *Ves.* 89.

MITFORD *versus* FEATHERSTONHAUGH,

July 21, 1752.

(*Reg. Lib.* 1751. *B. fol.* 525. (1))

VOL. II. page 445.—In directing accounts, where there has been usury, extortion, or oppression, the Court often, by its decree, directs every thing doubtful to be taken most strongly against the person guilty of such proceedings. (2)

NOTES AND OBSERVATIONS.

(1) THE matter in question came forward on exceptions, which were overruled.

When exceptions have been overruled, it is not the practice to enter the points in *Reg. Lib.*

(2) See *Detillin v. Gale*, 7 *Ves.* 583.

BUDEN *versus* DORE, July 22, 1752.

(*Reg. Lib.* 1751. *A. fol.* 484.)

VOL. II. page 445.—Exceptions. Lord Hardwicke held that in the case of a bill for discovery of a defendant's title, he might object to make such discovery by his answer, (1) as well as by plea, &c.

NOTES AND OBSERVATIONS.

(1) **Thus** doctrine seems not inconsistent with the rules of good pleading; having regard to the distinction his Lordship lays down in the re- [380] port.

It seems, however, questionable, whether subsequent decisions, and many judicial observations, have not shaken the rule deducible from the principal case, and subjected a party to plead, or demur, instead of "objecting to answer by an answer."

See much reasoning, and most of the former cases referred to in 11 *Ves.* 285, 296, 303, &c. &c. See also 16 *Ves.* 382, &c., and 2 *Ves. & B.* 364, &c.

The BISHOP of WINCHESTER versus FOURNIER,

July 23, 1752.

(*Reg. Lib.* 1751. *A.* fol. 593.)

VOL. II. page 445.—Rolls. A promissory note, suspicious in itself(1) under the circumstances, and the admitted object of it being an improper one, even if the note were actually genuine; decreed, at the instance of the person alleged to have given it, to be deposited with the Register of the Court(1) in the first instance; with a declaration that the plaintiff was entitled to be relieved against it, without preventing the defendant from bringing an action on it within a reasonable time; and if delay in so doing, then to be delivered up.

NOTES AND OBSERVATIONS.

(1) **See** also the case of *Ward v. D. of Bucks*, on appeal, *Dom. Proc.*; 3 *Bro. P. C.* 581 and 587, octavo edition; and fol. 93, &c. folio edition.

This case is the one alluded to in the note at the end of the principal case, p. 449.

SENHOUSE *versus* EARL, July 23, 1752.

(*Reg. Lib.* 1751. *B. fol.* 650.)

VOL. II. page 450.—Held that a plea of foreclosure is not good without the foreclosure has been made absolute.

Though a mortgagee is not bound to discover his title deeds, where he denies notice; he must not only deny notice in general, but all special facts and circumstances charged, relating to it.

See also 3 Atk. 815.

NOTES AND OBSERVATIONS.

ALL that appears relative to the principal case in *Reg. Lib.* is, that the plea was ordered to stand for an answer, "with liberty for the plaintiff to except only as to the charges in the bill relating to notice of the articles or settlement therein mentioned, and any circumstances relating to the point of notice."

There seems a mistake throughout the whole paragraph relative to the case of *Jones v. Kendrick*, mentioned by Lord *Hardwicke*, p. 450. It is true there was originally a plea of a foreclosure, and that such plea was overruled. It could not, however, have been overruled on the ground reported, because the foreclosure had actually been made absolute; and it was not overruled by Lord C. *King*, but by Lord *Macclesfield*. See 5 *Bro. P. C.* 244, 247, octavo edition. The appeal to the House of Lords was not from the decision as to the plea, but from Lord C. *King's* dismissal of the bill itself, which sought a redemption.

The plaintiffs in that suit afterwards filed a Bill of Review, as for error apparent, in respect of several matters of form; to which the same defendant put in a demurrer, which was allowed by Lord C. *King*.

The appeal to *Dom. Proc.* was by the original plaintiffs from this decision; and the matter was ultimately compromised by an agreement, made an order of the House of Lords.

See the whole of the case accordingly, 5 *Bro. P. C.* 244, to the end of p. 253, in the octavo edition, and in the third vol. p. 315, &c. of the folio edition. j

CHETWYND *versus* LINDON, July 23, 1752.

(*Reg. Lib.* 1751. *A. fol.* 350.)

VOL. II. page 450.—Demurrer should precisely distinguish each part of the bill demurred to. (1)

Though parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical (2) censures, &c. a charge against persons of a conspiracy, or attempt to set up a bastard child, is not demurrable unto; that not being, *per se*, an indictable offence.

NOTES AND OBSERVATIONS.

(1) *VIDE* 2 *Ves. & B.* 118, 121, 124.

(2) *See* 2 *Ves.* 493.

GRIFFITH *versus* HOOD, July 24, 1752.

(*Reg. Lib.* 1751. *A. fol.* 507.)

VOL. II. page 452.—Baron and Feme. Where a suit is relative to the separate estate of a wife, the bill ought to be filed by her prochein amy. If, however, such a suit be instituted by the husband and wife jointly, the Court will secure the fund for the wife, in the name of trustees, or the Accountant General. (1)

NOTES AND OBSERVATIONS.

THE bill was filed by the husband and wife.

(1) *See* 1 *Fonb. T. E.* 94, &c.

The money in question was ordered to be paid into Court, and laid out in the name of the Accountant General, without prejudice, and subject to further order: and the defendant *Hood* was directed, “within two months from the time of the decree, to pay unto [383] the plaintiff, the wife, or some person authorised

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by her, for her separate use, the arrears of the interest thereof, at the rate of 4 *per cent. per annum*, accrued from 18th day of November, 1749, which was to be without prejudice to any of the parties." *R. L.*

MORRIS *versus* THE LESSEES OF LORD BERKELEY, *July 25, 1752.*

VOL. II. page 452.—Injunction to stay building not granted in cases of mere injury or inconvenience to property or persons adjoining, or otherwise, except by agreement, or the building being of such a nature as to stop up ancient lights.(1)

NOTES AND OBSERVATIONS.

(1) SEE the next case in 2 *Ves.* 453, of the *Attorney General v. Doughty*; *Ryder v. Bentham*, 1 *Ves.* 543, and the notes thereon, *antea* (242;) particularly the case 1 *Dick.* 163, 165, and *Attorney General v. Nichol*, 16 *Ves.* 338.

It appears from thence, that the Court will not interpose upon every degree of darkening, even ancient, lights. See 16 *Ves.* 343.

GRAYSON *versus* ATKINSON, *July 17, 1752.*

VOL. II. page 454.—Devise, execution and attestation of.—Not necessary under the Statute of Frauds that a testator should sign in the presence of the witnesses. His acknowledgment of his hand-writing is sufficient, although done to the several witnesses at different times.(1)

Where a will is to be established in Equity, it must be proved by each of the subscribing witnesses, if living; and if dead, their deaths must be substantiated, &c.(2)

One of the witnesses being beyond sea, there should have been a commission to examine him; and the Court could only direct a trial at Law.(3)

Attestation of marksmen good under the Statute of Frauds.

NOTES AND OBSERVATIONS.

(1) VIDE *Ellis v. Smith*, 1 *Ves.* jun. 11, &c. and Mr. Vesey junior's very judicious notes. See also *Addy v. Grix*, 8 *Ves.* 504.

It was determined in *Croft v. Pawlet*, 2 *Stra.* 1109, that it is not absolutely necessary to mention, in the form of attestation, the fact of the signature of the witnesses in the devisor's presence. And the Court observed, that the fact of witnesses, having, or not, com- [384]
plied with such requisites, was evidence to be left to a jury.

(2) See *Bootle v. Blundell*, 1 *Cooper, Ch. Rep.* 136, 137. Vide also 2 *Bro.* 503; 4 *Bro.* 230, 231; and 5 *Ves.* 404; likewise *Ogle v. Cook*, 1 *Ves.* 177, *et antea* (103.)

A witness to a devise having become insane, proof of his hand-writing was allowed. *Bernett v. Taylor*, 9 *Ves.* 381; and in the case of *Mackenzie v. Frazer*, 9 *Ves.* 5, where a will was 30 years old, and no account could be given of one of the witnesses, further proof was dispensed with.

(3) See, however, *Lord Carrington v. Payne*, 5 *Ves.* 404, and the cases in the preceding note.

A Court of Law in the trial of an action on a will, is content with the examination of any one of the attesting witnesses; but on the trial of an issue, *devisavit vel non*, directed by a Court of Equity, there must be an examination as to all the witnesses. *Bootle v. Blundell*, *Coop. R.* 136.

Notwithstanding the stress laid by Lord *Hardwicke*, in pp. 457 and 459, as to the benefit supposed to be contemplated by the statute from the proof or disproof of the hand-writing of a witness, or of a devisor, it is not to be supposed the framers of that statute could have meant it to operate as an interdiction against the making of a devise, or the attestation of one, by illiterate persons, utterly unable to write their names. It is, besides, to be observed, that learning was then by no means so common as in the

time even of Lord *Hardwicke*. It is rather curious, that there does not appear any printed case, in which it was made questionable, whether an attestation of a [385] devise by marksmen was good, between the passing of the statute of frauds and the year 1803. Mr. Serjeant *Hill*, however, stated there had been several such cases. See *Harrison v. Harrison*, 8 *Ves.* 185, 186; and *Addy v. Grix*, *ibid.* 504.

It should seem that Lord *Hardwicke's* reasoning at the top of page 458, is very sound, notwithstanding the dicta attributed to his Lordship elsewhere, and to Lord *C. J. Willes* in the Rep. 1 *Ves.* jun. 14-16. See Mr. *Vesey junior's* note, *ibid.* pp. 17 and 18.

WHITE *versus* HAYWARD, July, 1752.

VOL. II. page 461.—Revivor is allowed for costs taxed. Costs die with the party unless taxed;(1) and even where taxed in the life-time of such party, and the person to pay them is in prison, he will be discharged unless there be a revivor within a reasonable time; this is in like manner as in a case of sequestration. Difference between process at law and in equity.

Process in equity is *in personam*, for a contempt; not so at law. Writs of execution at law, and writs of *fi. fa.* do not abate.

Writ of sequestration in equity does abate. The Court, however, will allow time to revive.

Process of sequestration in equity nearly resembles that of *fi. fa.* at law; but there is the above material distinction, in case of the party's death.

NOTES AND OBSERVATIONS.

(1) SEE, however, *Johnson v. Peck*, the next case, and 2 *Ves.* 465; *Kemp v. Mackrell*, 3 *Atk.* 812, and 2 *Ves.* 580, *et postea*. Also *Blower v. Morret*, 3 *Atk.* 772; *Hall v. Smith*, 1 *Bro.* 438; and *Morgan v. Scudamore*, 2 *Ves.* jun. 313.

JOHNSON *versus* PECK, July 25, 1752.

(*Reg. Lib.* 1751. *A.* fol. 540.)

VOL. II. page 465.—Though the strict rule be, not to allow revivor merely for costs, which have not been taxed, (1) the Court leans against enforcing it, if there be any thing in the decree yet remaining to be executed.

NOTES AND OBSERVATIONS.

(1) SEE the preceding case and the references.

TANER *versus* IVIE, July 27, 1752.

(*Reg. Lib.* 1751. *B.* fol. 661.)

VOL. II. page 466.—Prochein amy. The next friend of an infant allowed costs, though the bill had been dismissed; the Master having previously reported the suit for the infant's benefit. (1) Executors may make a valid assignment of their testator's property in respect of their own debts, or where they apply the consideration of it to their own purposes, if no fraud in the other party, or reasonable ground of suspicion in the transaction. (2)

NOTES AND OBSERVATIONS.

(1) THE Court, however, in *Pearce v. Pearce*, refused a next friend his costs, where he might, by reasonable diligence, have known the fact of a recovery having been suffered; notwithstanding the infant's benefit was his only object in the suit. 9 *Ves.* 548.

Nugent v. Gifford, mentioned pp. 466-7, is cited in *Jacomb v. Harwood*, 2 *Ves.* 269.

The other case, mentioned p. 467, relative to the executors of the *D. of Bucks* and *Mead* the Banker, is that of *Mead v. Lord Orrery*, 3 *Atk.* 235.

(2) See *Nugent v. Gifford*, and *Mead v. Lord Orrery*, above referred to. Per Lord *Hardwicke*; also p. 469; and *Jacomb v. Harwood*, 2 *Ves.* 265, &c. *et antea* (338).

CHAMP *versus* MOODY, July 28, 1752.

(*Reg. Lib.* 1751. *A. fol.* 501.)

VOL. II. page 470.—Generally speaking, to warrant a reservation of interest on further directions, it should have been directed on the original decree. The case, however, of a direction for a trial at law is an exception; and there may be others founded on the peculiar nature of a case.(1)

NOTES AND OBSERVATIONS.

(1) *VIDE* *Creuze v. Hunter*, 2 *Ves.* jun. 157, &c. and the note to p. 169, *ibid.*

See also the cases in the note, *antea* (293), on the *D. Bedford v. Coke*; likewise 2 *Ves.* jun. 164, and *Bickham v. Cross*, 2 *Ves.* 471 (the next case but one.)

***Ex parte* WATKINS, July 29, 1752.**

(*Reg. Lib.* 1751. *B. fol.* 540.)

VOL. II. page 470.—Guardian appointed merely on petition, without any suit in Court, but not without a reference to the Master.(1)

NOTES AND OBSERVATIONS.

It has long been quite settled, that the Court will appoint a guardian, and allow maintenance, on a mere petition. See *ex parte Salter*, 3 *Bro.* 499, and 2 *Dick.* 769.

[388] *RICKHAM versus* CROSS, July 29, 1752.

(*Reg. Lib.* 1751. *A. fol.* 561.)

VOL. II. page 471.—Interest computed on various sums reported due.(1) and also on all arrears of interest (on other sums) and on costs.

NOTES AND OBSERVATIONS.

(1) THIS case turned on very particular circumstances. See 2 *Ves. jun.* 160, 164, and 166, where Lord *Loughborough*, C. though he, at first, thought it a singular case, said, "Lord *Hardwicke* was perfectly right, and did not vary from his general reasoning."

The petitioner's demand consisted of several particulars. The most material one was in respect of a bond for 900*l.* given by the petitioner's late husband on his marriage; the interest whereof was to be paid to her separate use, till laid out in a purchase of lands; the profits of which lands, when purchased, were to be paid her in like manner. This principal sum, and a very large arrear of interest thereon, had been reported due to her; as likewise a sum of 484*l.* 18*s.* 9*d.* for principal and interest, on account of a legacy; another sum of 194*l.* 7*s.* 3*d.* paid by her for interest of a bond and mortgage, due from her brother's estate; another sum of eleven guineas paid by her; and a sum of 290*l.* reported due to her for costs. The petition prayed, that these sums might be consolidated together, and carry interest from the date of the report, at 4*l.* and a half *per cent.* &c. &c. The Court referred it back to the Master, "to carry on the petitioner's subsequent interest, in manner following, *viz.* upon the principal sum "that carried interest at 5 *per cent. per annum*, [389] at the rate of 5 *per cent.*; and on the other principal sums, and also on all the interest and costs, at the rate of 4 *per cent.*; and also to tax her subsequent costs." *Reg. Lib.* 1751, *A. fol.* 561. See also per Lord *Loughborough*, C. 2 *Ves. junior*, 160; where, however, there is an omission of the above words, "and also on all the interest and costs." See *ibid.* 164, 166. As to the general practice, see *Creuze v. Hawker*, 2 *Ves. jun.* 157, &c. See also *Champ v. Moody*, the last case but one, and 2 *Ves.* 470: likewise 2 *Ves.* 661, 662; and *Morgan v. Morgan*, 2 *Dick.* 643.

EARL OF POMFRET *versus* LORD WINDSOR,

July 30, 1752.

(*Reg. Lib.* 1751. *A. fol.* 580.)

VOL. II. page 472.—Fine by persons in possession and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust, though a great length of time had elapsed.(1) In proving, exhibits *viva voce*, the rule is invariable, that the party can only examine the witness to the hand writings. Nothing, therefore, can be used as an exhibit, proved *viva voce*, in respect of which the other party would have had a right to cross examine.(2) It seems, however, that the benefit of such instruments, on the one side, and the right to controvert on the other, is a proper subject of adjustment either in the Master's office, under a commission by virtue of his certificate, or under a trial at law. See page 480. Purchaser for valuable consideration, without notice, is not bound by a private act of Parliament.(3) Executors and administrators are considered as trustees in many instances.(4) Length of time, how far a bar in equity to an account.(5) Though stale accounts are discouraged,(6) yet an administratrix, who was to see to the execution of a trust out of real estate, and was accountable for the amount, was not allowed to take any advantage from the length of time elapsed; and held that she ought to have seen the trust executed.

A second mortgagee, with notice of a former mortgage, but without notice of a former trust charge antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge.(7)

Though, in general cases, portions out of real estate carry interest in their nature without particular mention;(8) yet in the principal case, as a great length of time had elapsed, and some degree of laches occurred, with some complication of circumstances relative to the portion itself, the commencement of interest was fixed from the time of the sum to be raised having become a duty decreed upon a former occasion.

NOTES AND OBSERVATIONS.

(1) SEE *Stackhouse v. Barnston*, 10 *Ves.* 453.

The case referred to, p. 476, of *Lord Portsmouth v. Vincent*, is the one in 1 *Ves.* 430.

As to what appears at the bottom of p. 476, on the pre-

sumption arising from no demand being made on a bond for 18 years, it is to be observed, that a presumption from mere length of time will not be raised under a less term than the statutory limitation of 20 years ; though satisfaction may be presumed, if evidence be given in aid ; as if an account had been settled in the interim, without notice taken of the demand. *Oswald v. Leigh*, 1 T. R. 270. See also, 12 Ves. 265, 266, and [390] 377.

(2) See pp. 479, 480.

(3) A private act of Parliament, as to strangers, is considered only in the light of any private conveyance.

(4) See the Rep. p. 482.

(5) See in *Townsend v. Lowfield*, 1 Ves. 37, *et antea*, 32; also 1 Ves. 297, and 2 Ves. 565. As to the general principle of presumption from length of time, see 12 Ves. 265, and the cases above referred to by note (1).

(6) See the Rep. p. 483. Et vide *Hercy v. Dinwoody*, 2 Ves. jun. 87; and *Pearson v. Belchier*, 4 Ves. 627.

The author of these notes submits, that there being some mistake or complication of terms, about the middle of page 484, in the Rep. the sentence would more properly run thus :

“If then this trust for raising 20,000*l.* has not been executed, what bar is there from length of time [to a person coming] against an administratrix, calling for an execution of this trust of the real estate [which trust that administratrix ought to have seen performed]?”

The latter words, it will be seen, are substituted for those now in the Report ; *viz.* “which belongs to the administratrix and representative of the personal estate to do.”

(7) The Court (*inter alia*) declared accordingly, “that so much as should be coming to the plaintiff for their share of the residue of 20,000*l.* and interest, was an incum-

brance, &c. prior and preferable to the mortgages insisted upon by the defendants; those mortgages being only of an equitable estate; and it appearing further, that the said *B. H.* the first mortgagee, had notice of the trust, under which the plaintiffs claim." *Reg. Lib.* 584.

(8) See *Swynfen v. Scawen*, 1 *Ves.* 99, *et antea*, 68.

HARRISON *versus* RUMSEY, July 30, 1752.

(No Entry.)

VOL. II. page 488.—On petition. Decrees by consent, not set aside.*

NOTES AND OBSERVATIONS.

[*Held, that "infants are bound, by a decree taken by consent, though no reference to the Master, to inquire whether it was for their benefit; the Court itself proceeding on the idea that it was for their benefit. 1 *Brown*, 484, 488." Note to the third edition.]

It appears, however, that the Court has reversed a decree made on consent. See *Butterfield v. Butterfield*, *antea*, 81.

[392] *Ex parte* SKIP.

VOL. II. page 489.—Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury, under the general jurisdiction in bankruptcy.† It is otherwise where they apply to a Court of Equity by a bill to be relieved.(1)

NOTES AND OBSERVATIONS.

[†SEE 1 *Atk.* 125, and *Douglas*, 708.]

Vide also *ex parte Mather*, 3 *Ves. jun.* 372, and *Cooke's Bankrupt Laws*, 203 (sixth edition,) and p. 187 of the other editions.

(1) "There is great confusion in the language of every book relating to the subject [of bankruptcy, when] speaking of the Court of Chancery. That jurisdiction is not in the Court, but in the individual who happens to hold the great seal, by a special commission to issue commissions of bankrupt." Per Lord *Eldon*, C. 6 *Ves.* 782, 783. Et vide in *Phillips v. Shaw*, 8 *Ves.* 250.

ANONYMOUS, July, 1752.

VOL. II. page 489.—The affidavit to ground a writ of *ne exeat regno*, must not only state that the defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c.

NOTES AND OBSERVATIONS.

(1) For the general doctrine as to this writ, see 1 *Cox*, P. W. 263, fifth edition; 1 *Bro.* 376; *Cook v. Ravie*, 6 *Ves.* 283; *Shaftoe v. Shaftoe*, 7 *Ves.* 171; *Oldham v. Oldham*, and *Etches v. Lance*, *ibid.* 410, 417; *Tomlinson v. Harrison*; *Jones v. Sampson*; *Amsincke v. Barkley*, 8 *Ves.* 32, 593, 594. Also 10 *Ves.* 63, and *Jackson v. Petrie*, *ibid.* 164.

Ex parte ARTIS, August 1, 1752. [393]

VOL. II. page 489.—Bankrupt.—In the case of common personal annuities, after a bankruptcy, (1) a value is set upon them, and a dividend paid in respect of the sum thus ascertained.* But where there has been a decree for payment of the arrears, and for placing out a specific sum to secure the growing payments, the annuitant will still have a right to have the sum placed out; and if the dividends are not sufficient, the remainder must be made good out of the capital, to be raised by sale from time to time.

NOTES AND OBSERVATIONS.

[* SEE 1 *Atk.* 251, and 2 *Blacks. Rep.* 1106, 1107.]

(1) Vide per Lord *Eldon*, C. 14 *Ves.* 574, and *Cooke's*

Bankrupt Laws, 154, &c. sixth edition, and p. 139, &c. of the other editions; and more especially statute 49 Geo. III. c. 121. s. 17.

FINCH *versus* FINCH, October 24, 1752.

(*Reg. Lib.* 1751. *A. fol.* 613.)

VOL. II. page 491.—A defendant, who did not except to the first report of insufficiency of an answer, held not absolutely excluded from insisting on the same matter in his second answer. Though a defendant is not bound to answer what may subject him to ecclesiastical penalties;(1) or whether he is or not married to a woman he cohabits with; or whether he is an alien, &c.; he must, in a proper case, answer whether he hath, or not, a legitimate son.

NOTES AND OBSERVATIONS.

(1) VIDE *Brownsword v. Edwards*, 2 *Ves.* 243, *et antea* 334.

[394] LORD NORTH and GUILDFORD *versus* PURDON, July, 1752.

VOL. II. page 495.—Bequest of residue, to go over in a particular event (which took place) to ; (leaving a blank.) The executors excluded by such inchoate gift, and the next of kin entitled.(1) Next of kin are not excluded from taking the residue by a gift to them of legacies, &c.(2)

NOTES AND OBSERVATIONS.

(1) VIDE particularly *The Bishop of Cloyne v. Young*, 2 *Ves.* 91, *et antea* (285); *Blinkhorn v. Feast*, 2 *Ves.* 27, *et antea* (262); *et Langham v. Sunford*, 17 *Ves.* 435; and on appeal before Lord *Eldon*, C. 14th November, 1816, Michaelmas Term.

(2) Vide the end of the report, page 406; *Andrew v. Clark*, 2 *Ves.* 162, *et antea*, (314); and *Seley v. Wood*, 10 *Ves.* 71.

ANONYMOUS, July 10, 1754.

VOL. II. page 496.—Depositions *de bene esse* published, saving just exceptions, the witnesses being dead before an opportunity to have examined them in chief,(1) though there was delay in the cause on both sides.

NOTES AND OBSERVATIONS.

(1) VIDE *Gason v. Wordsworth*, 2 *Ves.* 336, 337, *et antea* 353 and 357.

EARL TYRCONNEL *versus* DUKE OF [395]
ANCASTER.

VOL. II. page 499.

NOTES AND OBSERVATIONS.

LADY *Blandford's* case, cited p. 502, is in 2 *Atk.* 542.
Hervey v. Hervey, cited p. 503, is in 1 *Atk.* 561.

ATTORNEY GENERAL *versus* CORPORATION
OF BEDFORD, July 15, 1754.

(*Reg. Lib.* 1753. *A. fol.* 559.)

VOL. II. page 505.

CHAPMAN *versus* SMITH, July 17, 1754.

(*Reg. Lib.* 1753. *A. fol.* 523.)

VOL. II. page 506.—Doubtful *modus* not determined by a Court of Equity, without a trial at law.(1)

An exception in the alleged *modus* that it was not to be paid when the land should be planted with hops, not fatal on the face of it in point of law.(2)

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NOTES AND OBSERVATIONS.

SEE *O'Connor v. Cook*, 6 *Ves.* 665, and 8 *Ves.* 535. Also *Richards v. Evans*, 1 *Ves.* 39, *et antea* 84.

(2) So rankness of an alleged *modus* is only *prima facie evidence de facto*, as to the non-immemorality, and is not conclusive by itself in point of law. Vide 6 *Ves.* 665, 672. 8 *Ves.* 534, 539.

In the principal case the matter was compromised about a year afterwards; the rector suffering the issues to be taken against him, *pro confesso*: and no costs were to be paid on either side. *Reg. Lib.* 1754. *A. fol.* 281.

HOW *versus* WELDON AND EDWARDS, *July 17, 1754.*

VOL. II. page 516.—Assignment of a sailor's share of prize-money at an under-value, set aside for fraud; but still to stand as a security for what was really advanced. (1)
The same equity as to an under assignment. (2)

NOTES AND OBSERVATIONS.

(1) SEE *Taylour v. Rochfort*, 2 *Ves.* 281, *et antea* (345).

(2) See 1 *Wils.* 229, and 2 *Woodd.* 388.

ANONYMOUS, (1) *July 18, 1754.*

VOL. II. page 520.—Publisher of advertisement as to proceedings in Court committed for a contempt; (2) but discharged on his submission and full disclosure. (3)

NOTES AND OBSERVATIONS.

(1) THE name of this case is *Cann v. Cann*, (*Reg. Lib.* 1753. *A. fol.* 423.) See 2 *Dick.* 795.

(2) Vide (*Roach v. Garra*n) 2 *Atk.* 469, and *S. C.* 2 *Dick.* 794; *et ex parte Jones*, 13 *Ves.* 237.

(3) See also 2 *Atk.* 472.

BULLOCK versus STONES, July 19, 1754. [397]

(*Reg. Lib.* 1753. *A. fol.* 518.)

VOL. II. page 531.—Devise of real and personal estate to the first son of A. when he shall attain 21, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the decree; held that the profits of the personal estate should accumulate; (1) that as to the real estate, it was a good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance, &c.

Devise of all real and personal estate "in trust" by "B. C. D." &c. must be construed by the subsequent acts to be done by them, and amounted here to a devise "to" them.

NOTES AND OBSERVATIONS.

AFTER the limitation to the heirs male of *John Stones*, the will proceeded thus:—"and for want of such heirs male to the first son, lawfully begotten, of *Christopher Stones*, and his heirs male for ever; and for want, &c. to the first son of *Francis Stones*, and his heirs for ever."

(1) Vide *Trevanion* and *Vivian*, 2 *Ves.* 430-2; *Roper on Legacies*, 205; *Hopkins v. Hopkins*, *Forr.* 44, and 1 *Ves.* 268; *Green v. Ekins*, 2 *Atk.* 473, and 3 *P. W.* 306, note *S. C.* Also *Montgomerie v. Woodley*, 5 *Ves.* 522.

Gore v. Gore, cited p. 522, is in 2 *P. W.* 28 to p. 65, and 2 *Stra.* 958. The author of these notes particularly desires to refer to the report in 2 *Strange*, as a supplement to what appears in 2 *P. W.* 65; from whence it appears, that Lord *Talbot*, C. ultimately decreed agreeably to the latter certificate stated in *P. Williams*. The author is in possession of a MS. case, on the latter events in the case of *Gore v. Gore*, as mentioned 2 *P. W.* 64, which was submitted for the opinion of Mr. *Talbot* in 1729,

somewhat more than four years before his appointment as Lord Chancellor. The author inserts merely as much of the case as is necessary, but thinks the opinion itself may be rather interesting to the profession.

[398] The case, after stating the first certificate, proceeds thus:—"Lord C. *King*,* on hearing the cause, doubted of the opinion, and adjourned it for further debate; but before the same came on again, *T. G.* had a son, who claimed the premises, both as tenant in tail under the will of his grandfather, and (his father being dead) as heir at law; and also under an agreement. *Edward Gore*, the testator's second son, died without issue; and *William*, the testator's third son, claimed the said manor under the said will, and insisted, that being a minor when the said agreement was made, he was not bound thereby; whereupon this further question was stated for Mr. *Talbot's* opinion."

"Question."

"In whom the freehold vested on the death of testator, or of *E. G.* his second son; and in what manner the son of *T. G.* the eldest son of the testator, should demand the premises; whether under the will of his grandfather, or under the agreement?"

"Opinion."

"The first part of the question depends upon the point which was referred to the Judges, whose opinion, in question of law, ought to have some weight. However, *W. G.* the infant son of *Thomas*, not having been a party to the former suit, he is not bound thereby, but is at liberty to bring the same question again in judgment. The limitation in the will to the first son of *Thomas*, who was not in *esse* at testator's death, if considered as a contin-

[399] gent remainder, was void, for want of an estate of freehold to support it. The objection to it, as an executory devise, arises from the remoteness of it, in

* Vide 2 P. W. 64.

regard it is limited after a term of 500 years; but that objection does not seem to be unanswerable. The interest, regarded at common law, is the estate of freehold and inheritance; and the chief reason for restraining executory devises, to take place in the compass of some life or lives in being, or in a few months after, is to prevent the freehold and inheritance continuing any longer in a state of uncertainty, and unalienable; but a term for years, howsoever long, doth not prevent the freehold taking place in possession *instantly*; though the tenant of the freehold is not in actual possession of the land during the term; nor is such freehold in suspense, or incapable of being alienable. If, therefore, this opinion was unprejudiced by the opinion of the Judges, I should incline to think the limitation to the first son of *T. G.* is good by way of an executory devise; and his case is a little stronger in Equity, because the 500 years term, though absolute in Law, is in Equity to be considered only as a security redeemable; and if the limitation to him was good, the freehold vested in him the moment he was born, and his title to the profits accrued from that time, subject to the incumbrances created by the will, and clear of all charges brought on the estate by the agreement, and the order for confirming it; which bound the interest of *T.* and *E. G.* only, and could not bind the infant son of *T.* who was no party to the agreement.”

“ *Charles Talbot*, 15th August, 1729.”

In the principal case it was (*inter alia*) declared, “ that after *John Stones* should have a son born, the said rents and profits ought to be applied for the maintenance and education of such son, till he should attain his age of 21 years.” *R. L.*

ARCHER *versus* POPE, July 19, 1754.

(Reg. Lib. 1753. A. fol. 528.)

VOL. II. page 523.—Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c.; the wife not an executing party. After the marriage a real estate of the wife came into possession. The husband dies. The wife marries B. and dies; bill by a younger child against B. and the heir of his mother. It seems that the statute of frauds could not have been taken advantage of, on account of the wife not having been an executing party, since the marriage took place, in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under her first husband's will, which recited the bond; from whence it was held she had bound herself at all events. (2)

NOTES AND OBSERVATIONS.

THE devise by the husband was not absolutely to the wife, as stated in the report. It appears from *R. L.* that after taking notice in his will, of his having neglected to make such settlement as had been agreed on, he thereby declared that in discharge of the said recited bond, he bequeathed to *R. H.* and another, all such shares of two freehold messuages as he was entitled to in right of his wife, and his interest in the same, in trust for her sole use for life; and afterwards to the use of his two sons *R. A.* and the plaintiff, and their heirs as tenants in common; and in case they should die before 21, then to his said wife, her heirs and assigns for ever, and all the residue, &c.

(2) See *Pawlet v. Delaval*, 2 *Ves.* 663, 671. *Harvey v. Ashley*, 3 *Ath.* 607. *Hargr. Co. Litt.* 37, a. and *Clinton v. Hooper*, 1 *Ves.* jun. 173.

With regard to what Lord *Hardwicke* states, p. 524, of the various informal agreements as to settling
 [401] property on marriage, see in *Lewis v. Madocks*, 8 *Ves.* 150, which was the case of a bond, with condition to settle all the personal estate the husband should be possessed of.

As to the law declared by Lord *Hardwicke*, p. 525, relative to a widow being bound to forego choses in action, &c. belonging to her, by having taken the benefit of a settlement made upon her marriage, where an infant, see *Harvey v. Ashley*, 3 *Atk.* 607, with *Hargr. Co. Litt.* 37, *a. note.*

The case of *Felton Harvey*, mentioned in the note to p. 526, is that of *Harvey v. Ashley*, 3 *Atk.* 607.

In the principal case, the declaration of the Court (see page 527) was, that the agreement ought to be carried into execution against the defendant *Pope*, and the defendant *R. A.* the wife's eldest son, and heir at law." *R. L.*

WHITHORN *versus* HARRIS, July 20, 1754.

(*Reg. Lib.* 1753. *B. fol.* 439.)

VOL. II. page 527.—Bequest to "near relations," means those within the statute of distributions.(1)

NOTES AND OBSERVATIONS.

(1) SEE *Goodinge v. Goodinge*, 1 *Ves.* 231, &c. *et antea*, 122. *Pyot v. Pyot*, 1 *Ves.* 335, *et antea*, 161, also *Roper on Leg.* 115, 116, &c.

CHILLINER *versus* CHILLINER, [402]
July 20, 1754.

(*Reg. Lib.* 1753. *A. fol.* 452.)

VOL. II. page 528.

NOTES AND OBSERVATIONS.

Harvey v. Ashley there cited, is in 3 *Atk.* 607.

LODER versus LODER, July 22, 1754.

(*Reg. Lib.* 1753. *B. fol.* 448.)

VOL. II. page 530.*—Portions. The vesting of, sususpended during the fathers life time.

NOTES AND OBSERVATIONS.

Graham v. Lord Londonderry, cited p. 531, is in 3 *Atk.* 393.

Lord Teynham v. Webb, cited *ibid.* is in 2 *Ves.* 198, *et antea* 325. Vide 2 *Ves.* 208, *et antea* 326, and also *D. Marlborough v. Lord Godolphin*, 2 *Ves.* 61, *et antea*, 277.

BERKLEY versus RYDER, et c contra, July 22, 1754.

(*Berkley v. Ryves*, *Reg. Lib.* 1753. *A. fol.* 561.)

VOL. II. page 533.†—Gift 'on condition to marry with consent, where good, and where only in terrorem.(1) Provision by a brother in favour of sisters, otherwise unprovided for, "upon their marrying with consent," construed as if made by a father. Such a provision, *aliter*, if made by a mere stranger.

Page 537.—Practice. A defendant having become better apprised of any matters after putting in his answer, cannot contravene or question his own admissions, &c. on the subject by a cross bill. His proper course is to put the further facts on the record by way of supplemental answer.(2)

NOTES AND OBSERVATIONS.

(1) SEE a variety of cases collected in *Roper on Leg.* 306 to 332; but more especially *O'Callaghan v.* [403] *Cooper*, 5 *Ves.* 117, and *Stackpole v. Beaumont*, 3 *Ves.* 89. See also *Dashwood v. Lord Bulkeley*, 10 *Ves.* 230, &c.

* Note, The fol. edit. is mispaged from p. 528 to 537.

† Mispaged in the fol. edit.

Daley v. Lord Clanrickard, cited p. 535,* is S. C. with *Daley v. Desbouverie*, 2 *Atk.* 261; as to which see 10 *Ves.* 241. *Harvey v. Aston*, cited *ibid.* is in *Com. Rep.* 726, and 1 *Atk.* 361. See Mr. *Sanders's* edition. Et vide *Willes' Rep.* 83; also 5 *Ves.* 138, 9.

In the principal case (see the report, p. 538,) the interest was directed (as there stated) "from the time of filing the bill." *R. L.*

(2) Though the practice, formerly, allowed the defendant to amend his answer, as stated by Lord *Hardwicke*, p. 537 of the report, it has since been very much improved by Lord *Thurlow* and Lord *Eldon*, C. The one of these Judges introduced, and the other restored a course, for the party to apply to put in a supplemental answer, instead of amending the former one. To obtain such an order, the party must state by affidavit, that when he put in his answer he did not know the circumstances upon which he makes his application; nor any other circumstances upon which, or in consequence of which he ought to have known the real facts; see *Jennings v. Merton College*, 8 *Ves.* 79. Per Lord *Eldon*, C. 10 *Ves.* 285, and *Wells v. Wood*, *ibid.* 401.

Ex parte DUPLESSIS, July 22, 1754. [404]

(*Reg. Lib.* 1753. *A. fol.* 433.)

VOL. II. page 538.

NOTES AND OBSERVATIONS.

SEE this case also 2 *Ves.* 286, 360, 555; also in 1 *Bro. P. C.* 415, octavo edition, and 5 *Bro. P. C.* 91, folio edition.

ATTORNEY GENERAL *versus* BOWLES,

July 24, 1754.

(*Reg. Lib.* 1753. *A. fol.* 568.)

VOL. II. page 547.—Lord Hardwicke's opinion, in the latter part of the judgment, has been overruled; and the term "erecting," as applied to charities, is now held to mean the substantial part of the gift, not the mere building of any tenements, &c.(1)

NOTES AND OBSERVATIONS.

(1) THE latter point of this principal case, as mentioned in the report, has been repeatedly overruled; and the modern cases seem to have established, that the "expressions of "erecting," "building," &c. must be taken as meaning that land is to be bought, unless the testator clearly and distinctly indicates the contrary. See *Ambl.* 616. *Attorney General v. Hyde*, *ibid.* 751, 2, and 1 *Bro.* 444, note. *Chapman v. Brown*, 6 *Ves.* 404, &c. et vide *ibid.* 407, 408, &c. See also *Attorney General v. Parsons*, 8 *Ves.* 186, 191.

In the principal case, the decree, as to the 200*l.* to be laid out, is as follows: "And as to the legacy of 200*l.* other part of the said sum of 500*l.*, his Lordship doth declare, that the same, or any part thereof, cannot [405] lawfully be laid out in the purchase of ground to build upon; but that the same may be lawfully laid out in building a school house, and a house for a school master, according to the said will upon any land in the village of N, which now doth, or may, belong to the said parish, and may be applied to that purpose. And it is ordered, that the relators be at liberty to apply to the Court within two years from this time for payment of the said sum of 200*l.* and interest, if they shall be able to lay a proposal before the Court according to the declaration before mentioned." *Reg. Lib.*

HYLTON versus HYLTON, July 25, 1754.

(Reg. Lib. 1753. A. fol. 573.)

VOL. II. page 547.—Gift of an annuity soon after coming of age to trustee, or guardian, set aside on general principles of public utility;(1) and here, furthermore, on particular circumstances of imposition. A person, however, may bind himself, soon after coming of age, under proper circumstances, as if, being actually in possession, and quite *sui juris*, he makes such a grant by way of reward.(2)

NOTES AND OBSERVATIONS.

(1) **VIDE** also *Hatch v. Hatch*, 9 *Ves.* 292; likewise 3 *Wooddeson*, appendix, and *Cray v. Manfield*, 1 *Ves.* 379, &c. See also in *Lord Chesterfield v. Janssen*, 2 *Ves.* 125, *et antea* 297. *Debenham v. Ox*, 1 *Ves.* 276.

Pierse v. Waring, cited p. 548, is also cited 1 *Ves.* 380.

As to marriage brocage bonds, noticed p. 549, see *Cole v. Gibson*, 1 *Ves.* 503, 506, &c. and *Scribblehill v. Brett*, 4 *Bro. P. C.* 144, octavo edition, with the notes there.

(2) **VIDE** in *Cray v. Manfield*, 1 *Ves.* 379, *et antea* 167.

The author of these notes rather thinks that [406] the course adopted by Sir *J. Strange*, M. R. in *Cray v. Manfield*, would not now be pursued, in a case so circumstanced.

HAWKINS versus PENFOLD, July 25, 1754.

VOL. II. page 550.—Bankrupt. A creditor receiving money, or bills of exchange, after an act of bankruptcy, but without notice of it, was protected in retaining it, by statute 19 Geo. II. c. 32.(1)

NOTES AND OBSERVATIONS.

(1) **SEE** also the late act 46 Geo. III. c. 135; likewise *Billon v. Hyde*, 1 *Ves.* 326, *et antea* 159.

The act referred to by Lord *Hardwicke*, p. 551 of the report, as to mutual debts, is the 5 Geo. II. c. 30. See further as to that point in *Billon v. Hyde*, *ubi supra*.

**ATTORNEY GENERAL *versus* THE GOVERNORS
OF HARROW SCHOOL, (1) July 26, 1754.**

(*Reg. Lib.* 1753. *A.* fol. 481.)

VOL. II. page 551.—Charity—Jurisdiction.—Where trustees of a charity have discretionary powers, the Court will not interpose unless they act corruptly.—Though it may not choose to interpose, it does not follow that an information, seeking the Court's interference, will be dismissed; since it may be serviceable to maintain a control over them.

Where there is, in point of substance, a visitor, it excludes the general interference of the Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. (2)

NOTES AND OBSERVATIONS.

(1) *VIDE* also *Attorney General v. E. of Clarendon*, 17 *Ves.* 491.

(2) See in the case of *Kirkby v. Ravensworth Hospital*, 15 *Vesey*, 305, and in that of *Attorney General v. E. of Clarendon*, *ubi supra*; *et vide antea* 53, 57.

[407] STACE *versus* MABBOT, July 26, 1754.

(*Reg. Lib.* 1753. *B.* fol. 506.—*Reg. Lib.* 1755. *B.* fol. 149.)

VOL. II. page 552.—New trial on forged instrument.

Courts of Equity are much less strict in granting new trials, than Courts of Law; it being necessary, not that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the Court itself should be quite satisfied. (1)

NOTES AND OBSERVATIONS.

(1) *VIDE* 4 *Ves.* 206, 207; 9 *Ves.* 165, 169; 11 *Ves.* 51; 3 *Ves.* & *Beames*, 41, &c. and *Coop. Rep. Ch.* 99.

In the principal case, it appears that the trial did not come on until the sittings after Hilary Term, 1756. The Jury found upon the several issues, that the bond, and paper writings thereby referred to, were not executed by, or of the hand-writing of Mr. *Girlington*. And the cause coming on, upon the equity reserved, &c. upon the 15th of March following, and no one appearing for the material defendants, though they had been served, &c. the Court (*inter alia*) ordered those defendants to pay the plaintiff's their costs of the last trial, and restrained them from proceeding at law against the plaintiff, or Mr. *Girlington's* executors, for any demand upon any of the writings or papers mentioned in the issues; and further ordered, that the said papers and writings, and also all other papers and writings produced before the Master by them, or any of them, in support of their claims, should be detained by the Master in his custody until the further order of the Court. *Reg. Lib. 1755. B. fol. 149.*

GAGE *versus* LADY STAFFORD, [408]

July 27, 1754.

(*Reg. Lib. 1753. A. fol. 464.*)

VOL. II. page 556.—As to the jurisdiction of Foreign Courts. (1)
A commission granted to examine at Paris, as to the extent of jurisdiction of a particular Court erected there; but not as to the original constitution of it.

NOTES AND OBSERVATIONS.

(1) THE Court in question seems to have been created by an arret of the King of France, and to have been in a degree subversive of the known Courts of ordinary jurisdiction there. Vide per Lord *Hardwicke* on the plea *postea*. As to the general doctrine on the sentences of foreign Courts, see *Newland v. Horseman*, 1 *Vern.* 21, and Mr. *Raithby's* notes.

The author of these notes ought, perhaps, to notice here, that the profession in this country will shortly be able to derive much important information, as to the above subject,—and on others of much greater consequence, from a work now in the course of publication. It is from the pen of Mr. *Henry*, the late Chief Judge of the colony of Demerara. This gentleman has made the Civil Law, and the adoption of it amongst the different States of Europe, his peculiar study: and it may safely be said, Mr. *Henry* seems to have a clear, methodical, and luminous mind, united with enlightened ideas. From the nature of the work, the author of these notes thinks it will be of essential advantage to Europe at large.

In the principal case, the plea mentioned in p. 556 of the report, as having been over-ruled, &c. [409] was determined about ten years before; and there is a short report of it in 3 *Atk.* 215.

The author of these notes being in possession of a manuscript note of Lord *Hardwicke's* judgment more at length, thinks its insertion may be acceptable. It is as follows :

GAGE versus BUCKLEY, March 23, 1744.

This bill was brought for an account of the money arising by the sale of several actions of the French East India Company against the defendant the representative of Mr. *Cantillon*, who was employed by the plaintiff, and incited to sell the actions at a particular time, in order to pay some bill of exchange drawn by *Gage* the plaintiff on Mr. *Cantillon*; and the fact alleged by the bill was, that Mr. *Cantillon* had sold the actions before the time directed, at a very high price, and then accounted with the plaintiff as if they had been sold at the day appointed. To this bill defendant pleaded two pleas: first, the statute of limitations. Second, a judgment upon the case in a Court of Paris, called the Court of Actions, which Court was a Court of extraordinary jurisdiction, erected by two arrears

of the King to determine suits merely upon questions relating to the negotiations of the East India Company's actions, and every thing relating thereto; and in support of this plea were cited *Barrow v. Gensio Lord King, Mod. Ca. in L. & Eq.* and *Newland v. Horseman, 1 Vern. 21,* and S. C. in *Shower v. Lord Raymond, and 2 Ch. Ca. 74.* Several objections were made against the plea.

Those which were material will appear by what [410] Lord Chancellor said upon it.

Lord Chancellor.—

Two questions made in respect to this plea,

1st. Whether the subject matter is in itself pleadable?

2nd. If so, whether properly pleaded?

As to the first, the general question is, whether the judgment of a Foreign Court can be pleaded in bar here to relief and discovery; no case or authority has been cited for this purpose; and I should be very cautious how I allow it as a precedent, especially of a Court not of established and ordinary jurisdiction, but a special Court, proceeding summarily, and for a particular purpose only. The judgment of a Court abroad is evidence of a debt at Law; but if matter of evidence, it could not be pleaded; and, I think, could not be pleaded at Law.

Judgments of inferior Courts here are pleadable, because they derive their jurisdiction from the same source, viz. the crown; but foreign jurisdictions otherwise.

But it is said, that though it is not pleadable at Law it is so here, because the rule of pleading differs.

But if this is not a bar to an action, there is no reason why it should be a bar in Equity, when the demand is for the same thing.

Equitable bars are allowed by reason of a difference of jurisdiction. But though this sentence may be a defence in Equity, and evidence of the right, it would not follow, it can be pleaded; for there are many defences good in Equity that cannot be turned into pleas; [411]

as length of time, in many instances, is not a bar by statute.

The validity of this sentence depends on many doubtful points of the Law of France, which must be made out by future proof.

But suppose such a sentence pleadable, the next question is, whether this is rightly pleaded; and it is objected, that the Court is erected by arret, not registered by the Parliament of Paris, which is necessary.

To this it is said, that there is a general argument of this being according to the laws and constitution of France. I will not enter into that point at present: but it is certainly an additional argument against this as a plea, that it is the sentence of a Court of doubtful jurisdiction in its own country.

I should make great difference between the force of a sentence of a Foreign Court of known and established jurisdiction, and of such a Court as this, erected only by arret, and taking away the jurisdiction of the ordinary Courts of Justice.

Second objection. This does not appear to be a case within the jurisdiction.

I will not give any conclusive opinion upon this; but I doubt much whether the arret extends to deposits and trusts of stock.

Third objection. It is not pleaded that the sentence was pronounced by seven Commissioners, which is the quorum in the arret.

All judgments here, if pleaded, must be specially averred to be by such quorum as the law requires. Indeed, in Courts of ordinary jurisdiction, it is sufficient to [412] say by the Court, because Courts take notice of their jurisdiction; but it is otherwise of Courts newly erected, or specially appointed. I think, therefore, that this is a strong objection.

These objections show that the most I can do in this

case is to allow the plea to stand for an answer, with liberty to accept, and save the benefit to the hearing.

This can be no inconvenience, because, if the plea was to be allowed, you must support it by evidence of the Law of France; and I believe the defendant would not be advised to rely singly on that, without going into the merits also.

The laws of foreign countries, if doubtful, may be proved by books, written by their lawyers upon them; or, if there are none, then, by evidence.

Wherefore the Lord Chancellor saved the benefit of the plea to the hearing.

As to the plea of the statute, the case appeared to be, that the plaintiff was abroad, and had always been so from the time of the transaction.

To this it was objected, that the plaintiff, to bring himself within the saving of the statute, must return into England. For plaintiff, was cited contra 2 *Saunders*, 220.

This plea over-ruled, with liberty to insist on it at the hearing.

Continuation of

[413]

GAGE *versus* LADY STAFFORD.

VOL. II. page 557.—Practice. The ancient sum of 40*l.* as the amount in which security must be given to answer costs on the plaintiff's residing abroad, is not increased under adverse motion on any special circumstances. If, however, such a plaintiff asks a favour of the Court, further terms may be imposed on him.

FURTHER NOTES AND OBSERVATIONS.

SEE the report, page 557; et vide *Ogilvie v. Hearne*, 11 *Ves.* 598, et per Lord *Eldon*, C. *ibid.* 600, where his Lordship quite disapproves of Lord *Hardwicke's* inclination, that the infringement of the settled rule should be discretionary.

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For other points, as to the practice of security for costs, vide *Meliorucchy v. The same*, 2 Ves. 24, et antea, 260.

HARE *versus* ROSE, July 27, 1754.

(*Reg. Lib.* 1753. *A. fol.* 444.)

VOL. II. page 558.—After a decree for an account in a suit by parties interested in the surplus, where due proceedings take place between the plaintiffs and defendants; there is no occasion to give notice to creditors. Costs having been given⁽¹⁾ here, in the first instance, they were to be paid before debts, &c.

NOTES AND OBSERVATIONS.

(1) THE order was for a separate report as to the costs, and for payment of them. *Reg. Lib.*

The motion before the Court was to set aside that order for irregularity, and want of notice to the creditors, who had gone in before the Master [as stated in Mr. Vesey's report]; and also that the Master might make a separate report as to the debts and legacies. The latter part alone of the motion was granted.

[414] HAWKINS *versus* OBEEN, July 27, 1754.

(*Reg. Lib.* 1753. *A. fol.* 310.)

VOL. II. page 559.—Infant trustee. A decree having been made for sale of an estate, and that a trustee should join in the conveyance, that trustee dying, his infant heir bound to execute the conveyance, under the stat. 7 Ann, c. 19. Such a decree against the ancestor would obviate any doubt, as to whether his infant heir were or not a trustee within the act.⁽¹⁾ Trust estate will pass by a general devise.⁽²⁾

NOTES AND OBSERVATIONS.

(1) SEE the report, p. 560. It appears, however, that in point of fact, a reference had been made for the Master

to ascertain "whether *Obeen* the son, was an infant and trustee within the statute;" and that the Master had certified in the affirmative.

The application ought not to have been made by motion, as stated in the report, but upon petition. That is the only mode directed by the act.

(2) Though the cases appear contradictory, the general rule seems to be, that a trust estate will pass by a devise in mere general terms, unless an intention to the contrary can be inferred, either from expressions in the will, or from objects of probable convenience. See *Lord Braybrooke v. Inskip*, 8 *Ves.* 417, 432, 434, &c. The proposition stated therefore in *Attorney General v. Buller*, 5 *Ves.* 339, 340, is, in fact, overruled. The Court, indeed, seems to have looked so much at the quantum of convenience in each particular case as to have rendered the last mentioned rule of trust estates passing by a mere naked devise of very little use; see *ex parte Sergison*, 4 *Ves.* 147. *Ex parte Brettell*, 6 *Ves.* 577; and *Lord Braybrooke v. Inskip*, *ubi supra passim*. Lord Eldon, C. says in *Lord Braybrooke v. Inskip*, that the rule is not that in every question as to the devise of a [415] trust estate, where general words are used, the property shall, or shall not, pass by them, but that in each case the Court will look at every part of the will for the probable intention, 8 *Ves.* 436.

SLEECH versus THORINGTON, July 29, 1754.

(*Reg. Lib.* 1753. *B. fol.* 507, entered "*Sleech v. Hatch.*")

VOL. II. page 560.—Will, construction as to legacies specific and otherwise. (1) Bequest of 400*l.* East India bonds, "under the circumstances not specific; but a legacy of quantity, to be made good out of the general assets; the testatrix having repeatedly, in this bequest, omitted the word "my," which she had used

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in other bequests clearly specific; and having only one East India bond at her death.

Bequest of South Sea stock, in parcels, to a larger amount than testatrix was possessed of, held specific, the bequest of the last parcel being called "the remaining South Sea stock standing in her name."

These legatees must abate in proportion *inter se*.

Bequest "to the two servants that should live with testatrix at her death; she had three at that time, and all of them were held entitled." (2)

Baron and feme.—Husband suing for the wife's property, must make a settlement. If he is out of the jurisdiction, or otherwise leaves his wife unprovided for, the Court will order payment of interest to the wife, till he returns and maintains her properly. (3)

NOTES AND OBSERVATIONS.

(1) UPON these questions relative to legacies of stock, see 1 *Roper on Leg.* 17, &c. and 24.

(2) See *Roper on Leg.* 114.

(3) See pp. 561, 562; et vide *Wright v. Morley*, 11 *Ves.* 12; *Watkins v. Watkins*, cited p. 562, is in 2 *Atk.* 96, 98.

Perse v. Snaplin, cited *ibid.* is also cited 1 *Ves.* 424, and is rep. 1 *Atk.* 414.

The case of *Coventry v. Carew*, cited p. 564, is in 2 *Atk.* 366.

Tomkins v. Tomkins, cited at the bottom of p. 564, is in 3 *Atk.* 257. See also *Stebbing v. Walker*, 2 *Bro.* 83; and *Hampshire v. Pearce*, 2 *Ves.* 216.

[416] *PITT versus CHOLMONDELEY,*

July 30, 1754.

(*Reg. Lib.* 1753. *B. fol.* 448.)

VOL. II. page 565.—Account. Difference between where there is an open general account, and where a party has leave given only to surcharge and falsify. In the latter case the burthen of proof lies on the party having such liberty. (1) The Court will,

however, admit a greater latitude in cases of surcharge, &c. as between guardian and ward, and others, where one party is consulant of the accounts, and the other is not, than it allows where the parties are on equal terms.

NOTES AND OBSERVATIONS.

(1) SEE *Tbwtsonend v. Lowfield*, 1 *Ves.* 35, 37, *et antea* 31. Et vide *Sewell v. Bridge*, 1 *Ves.* 297.

As to Lord *Hardwicke's* reference in p. 567 of the rep. to the years 1720 and 1721, the allusion is to the state of things before the passing of Sir *J. Barnard's* act against stock jobbing; viz. Stat. 7 Geo. II. ch. 8.

HUCKS *versus* HUCKS, July 31, 1754.

(Reg. Lib. 1753. A. fol. 482.)

VOL. II. page 568.—Sir Thomas Clarke, M. R. His Honour decided that under a limitation by marriage articles for the first son, and the first son of such first son, the former could not be restricted to a life estate, or take less than an estate tail; but the law seems contra now. (1) Land purchased and suffered to descend, decreed to be taken as a part performance and satisfaction of the marriage articles. (2) Election. (3)

NOTES AND OBSERVATIONS.

(1) THE law now seems contrary to the decision of the Master of the Rolls in the principal case; and, that an unborn son may take an estate for life, [417] either through the medium of a power, or by an express use. See *Routledge v. Dorrill*, 2 *Ves.* jun. 357, 366; and *Fearne, Ex. Dev.* 325; with Mr. *Powell's* notes.

(2) The Court declared, “that the lands purchased by the father, and left to descend to the plaintiff, ought to be deemed as part performance and satisfaction of the articles, in case the plaintiff, the son, had accepted those lands, so descended; but, he declining to accept those lands,” a sum, ascertained by the Master, was ordered to

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be laid out in a purchase of lands, to be settled; and the plaintiff was directed to convey the lands descended.

(3) The plaintiff's father had, by his will, directed lands of the above value to be purchased, and (*inter alia*) settled on the plaintiff for life; and had made several bequests in his favour. The plaintiff was put to his election, and chose to take under the articles. *Reg. Lib.*

ELLISON *versus* AIREY, August 1, 1754.

(*Reg. Lib.* 1753. *A.* fol. 543.)

VOL. II. page 568.—S. C. antea 73. Charge by will of the whole real estate in aid of personal for debts and legacies, not restrained by the subsequent devise of a particular part for that purpose, without negative words.(1)

NOTES AND OBSERVATIONS.

(1) SEE the case of *E. of Godolphin v. Penneck*, 2 *Ves.* 271, 272, *et antea* 341.

As to Lord Warrington's case, cited p. 569 of the report, see the note to *E. of Godolphin v. Penneck*, antea 341.

[418] The Rep. of that case is 1 *Bro. P. C.* 511, octavo edition; and 4 *Bro. P. C.* 90 of the folio edition.

WOFFINGTON *versus* SPARKS, Aug. 2, 1754.

(No Entry.)

VOL. II. page 569.—Bonds.—Assignment of bond to co-obligor, who pays it, is of no use; since even the principal may plead payment to an action in the name of the obligee.(1) Action, however, lies on the case, and, perhaps, *indebitatus assumpsit*.

NOTES AND OBSERVATIONS.

(1) VIDE *Gammon v. Stone*, 1 *Ves.* 339, *et antea* 162.

WORTLEY versus BIRKHEAD, Aug. 3, 1754.

(Reg. Lib. 1753. B. fol. 446.)

VOL. II. page 571.—Mortgage.—Tacking.—A third incumbrancer may, *pendente lite*, and before a decree, gain a priority over the second, by taking in the first. Such thing, however, not allowed after a decree settling the priorities. Demurrer allowed on the latter ground. Bill of review on new matter must be on leave of the Court and affidavit, showing the party's right; that it was not known to him at the time of the decree, or since such other time as he could have used it for his advantage in the former cause.(1)

NOTES AND OBSERVATIONS.

(1) SEE in the *E. of Portsmouth v. Lord Effingham*, 1 Ves. 430, 435, *et antea*. Et vide *Misford Pl.* 78; and *Cole v. Gibson*, 1 Ves. 504, *et antea* 211. Vide also *Beame's Ord.* Ch. 1 and 2.

KINSEY versus KINSEY, Aug. 3, 1754. [419]

(Reg. Lib. 1753. A. fol. 386.)

VOL. II. page 577.—S. C. 3 Atk. 809. A decree cannot be pleaded, unless it has been signed and enrolled.

***Ex parte* HIGHAM, August 8, 1754.**

VOL. II. page 579.—Baron and feme. The Court refused to let the whole of a wife's fortune be paid to her husband, although she was present in Court, and consented to it.(1)

NOTES AND OBSERVATIONS.

(1) *S. C.* on this point only 3 Atk. 812.

This decision seems preferable to that of the Master of the Rolls in *Willats v. Cay*, 2 Atk. 67, where the whole was suffered to be paid to the husband, though he was insolvent. In later cases, however, the Court seems to have

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considered itself bound, if the wife pressed it. *Dimmock v. Atkinson*, 3 Bro. 195; 2 Ves. jun. 677; and 10 Ves. 88. See also the note on *ex parte Gardner*, (2 Ves. 671, 672) *postea*.

KEMP *versus* MACKRELL, Aug. 8, 1754.

(Reg. Lib. 1753. A. fol. 495.)

VOL. II. page 579.—Parties resting their defence in an issue at law upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence; or to say the forged instruments were immaterial. Though, generally speaking, costs die with the party, if they have not been taxed; (1) several exceptions are allowed to it; and revivor may be for costs alone, under particular circumstances. (2)

NOTES AND OBSERVATIONS.

(1) VIDE *White v. Hayward*, 2 Ves. 461-2, and the notes thereon, *antea*, (385); also *Johnson v. Peck*, 2 Ves. 465, *et postea* 386.

(2) S. C. on this point only, 3 Atk. 812.

[420] TUDOR *versus* ANSON, August 9, 1754.

(Reg. Lib. 1753. B. fol. 309.)

VOL. II. page 582.—A defect of a surrender of copyholds, &c. is supplied in favour of a widow, children, &c. without any statement that they are left unprovided for; but it is not supplied in favour of grandchildren.

It is supplied in favour of creditors, where no other real estate, under a general devise to pay debts. (1)

NOTES AND OBSERVATIONS.

(1) VIDE *S. P. Ithell v. Beane*, 1 Ves. 215, *et antea* 114. See also particularly *Byas v. Byas*, 2 Ves. 164, *et antea* (315); which (*inter alia*) refers to *Seriven on Copyholds*, 134, 135-6, &c. Ibid 162-3, &c. *Quod vide*.

EARL OF BATH *versus* EARL OF BRADFORD,

October 26, 1744.

(*Reg. Lib.* 1753. *A. fol.* 516.)

VOL. II. page 587.—Interest.—Lessor covenants for quiet enjoyment, and devises his estate in trust to pay debts. Lessees, being evicted, recover against his executors, and assign the judgment. This is a debt by specialty, and the assignees are entitled to interest.

Devise in trust to pay debts is not within the statute of fraudulent devises. S. P. 1 Bro. 311. Vide also Mr. Sanders's note to *Plunkett v. Penson*, 2 Atk. 292. Trustees to pay debts may fairly raise by sale or mortgage without waiting for a decree [No suit being instituted]. There is a difference, in consideration of law and the strict rules of the Court, as to the case of a lunatic being let in to take exceptions to a Master's report after its being confirmed, and that of an infant; but it is equally open to the discretion of the Court in either case.

NOTES AND OBSERVATIONS.

Carr v. Lady Burlington, 1 P. W. 229; and *Maxwell v. Wettenhall*, are the cases alluded to by Lord Hardwicke, page 588 of the report, as cited at the Bar.

With regard to his Lordship's particular observations on *Maxwell v. Wettenhall*, see Mr. Cox's note, 2 P. W. 26. It appears from *Reg. Lib.* rela- [421] tive to it, that interest was not directed as to any simple contract debts; that the question was "whether any interest," and from that time, should be paid for certain legacies, insisted upon as charged on the real estate. The whole report, therefore, of that case in P. W. is manifestly incorrect, and at variance with the most acknowledged authorities on various points. See Mr. Cox's note.

As to various points in respect of interest, as given in the Courts of Law and of Equity, see *Barwell v. Parker*, 2 Ves. 363, *et antea*. *Lloyd v. Williams*, (cited also in

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the Rep. p. 588,) 2 *Atk.* 108; *Creuze v. Hunter*, 4 *Bro.* 321; and the note to 2 *Ves. jun.* 169; together with *Sitwell v. Bernard*, 6 *Ves.* 520, and *Scho. & Lefr. Rep.* 11.

TOMKYNs versus LADBROKE, June 27, 1755.

(*Reg. Lib.* 1754. *A. fol.* 294.)

VOL. II. page 591.—Custom of London.—Orphanage part.—A freeman, on the same day with his will, by deed, assigns part of his personal estate in trust to separate use of his daughter. (1) He was then aged seventy-two; in the gout; and died in two days; the daughter had been married without consent; but he was reconciled. Held to be a testamentary disposition, in fraud of the custom, and that it might be disputed by the daughter's husband. Gift of personalty by freeman may be in life time, or in *extremis*, if he divests himself of the property, and it is enjoyed accordingly; (1) and if clearly not a testamentary act, in fraud of the custom. (2)

Though a settlement be made on a wife before marriage, if a great accession of fortune happen to the wife afterwards, the Court will direct a further settlement out of it, when it once obtains jurisdiction. (3)

NOTES AND OBSERVATIONS.

(1) He did not deliver over the security. See *Antrobus v. Smith*, 12 *Ves.* 39. See also *Ward v. Turner*, 2 *Ves.* 431, *et antea*, 378.

See also Lord *Eldon*, C.'s observations on most of the cases, 8 *Ves.* 154, &c.

[422] (2) Besides the cases in the preceding note, and as to cases in fraud of covenants, see *Randall v. Willis*, 5 *Ves.* 262, &c.; *Jones v. Martin*, 3 *Anstruther*, 890; but much more fully 5 *Ves.* 266, note.

Hancock v. Hancock, cited p. 592 of the Rep. is in 2 *Vern.* 665. The point there mentioned seems now perfectly settled; namely, that where the widow of a freeman was barred before marriage of her customary part,

and such freeman died, leaving a child, the orphanage part was a moiety, and not a third. See Mr. Raithby's note to *Lowe v. Chadwick*, 1 Vern. 6.

(3) See page 595 of the Report; et vide *Stackpole v. Beaumont*, 3 Ves. 89.

MOORE versus MOORE, June 28 [and July 8,] 1755.

(Reg. Lib. 1754. B. fol. 355.)

VOL. II. page 596.—S. C. 1 Dick. 66.—Supplemental bill, in nature of a bill of review, must be accompanied with a petition to rehear or appeal.

Account.—Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or administrator, and though such trustee who receives the trust money, and thereby becomes a debtor, is not to be considered and chargeable as executor, merely because he is so named in a will, yet where he is made a co-executor, and does not renounce, whilst he receives the trust money, he is properly made a defendant to a suit for a general account, and is accountable therein for his receipts; and this, the more especially, since his being named executor is a release of the debt at law.

Copyholds.—Intail of copyholds barred by a mere surrender to the use of a will, &c. where no peculiar custom showing the necessity of barring by recovery. (1)

To show a customary estate tail it is necessary to show remainders, or such long enjoyment, according to the limitation, as to exclude the supposition of a conditional fee.

As to whether residuary legatees, paid by executor, shall refund to legatees who were not paid immediately. (2)

Rule as to strict bills of review, is that the decree can be varied only upon errors complained of; except as to matters merely consequential upon the variation made. Same rule as to appeals in the House of Lords.

NOTES AND OBSERVATIONS.

VIDE page 597 of the Report. That a debtor to a testator's estate may be called to account in Equity under particular circumstances, such as the insolvency or

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collusion of the executor, see *Alsager v. Rowley*, 6 *Vesey*, 748.

[423] The order alluded to by Lord *Hardwicke* at the bottom of p. 597, was in 1741, and is stated 2 *Atk.* 139. See also Mr. *Beames'* very complete and valuable edition of the Orders in Chancery, 366, and the notes.

With regard to what follows at the top of page 598, vide the cases cited *antea* in that of *Cole v. Gibson*, p. 211, and see Mr. *Beames'* Orders in Chancery, 366, 367, note.

(1) The third edition of Mr. *Vesey's* Reports notices, that a custom to bar by surrender may be concurrent with a custom to bar by recovery; and it cites *Everall v. Smalley*, 2 *Stra.* 1197; and *Doe. dem. Wightwick v. Truby*, 2 *Black. Rep.* 944. And it also observes, that in 3 *P. W.* 10, Lord *Macclesfield* said, the only proper way of barring the intail of a copyhold, was by recovery in the Lord's Court.

(2) See the Report, page 600; et vide *Orr v. Kames*, 2 *Ves.* 194, et *antea* 324. See also *Walcot v. Hall*, 2 *Bro.* 305, and 1 *P. W.* 495, fifth edition, S. C.

[424] *SOUTHBY versus STONEHOUSE,*

June 30, 1755.

(*Reg. Lib.* 1754. B. fol. 402.)

VOL. II. page 610.—Feme covert by will pursuant to power(1) leaves to her husband “all the profits and revenues of my estate of A. and B. for life, and after his death, my said estates to my children, if I should leave any to survive me; but if I should leave no such child or children, nor the issue of such, the said estates to I. H.; making him sole heir in default of issue, and after the death of my husband.” The children take an estate tail; not fee simple; and the remainder to I. H. is good; not a contingent executory limitation on her dying

without children living at her death, but a general dying without issue. (2)

A devise of a testator's "estate at A." without more, will comprehend his whole interest in the lands, rather than be referable to the mere locality. (3)

If, however, words of limitation be added, they will determine the extent of the benefit.

NOTES AND OBSERVATIONS.

(1) SEE the Rep. page 612; et vide 2 *Wooddeson*, 345; 2 *P. W.* 624; 1 *Ves.* 139; and 2 *Ves.* 75. Et vide the notes to the *D. Marlborough v. E. Godolphin*, *antea*, 277.

(2) See 2 *Wooddes.* 344; 1 *Sid.* 148; 1 *Eq. Ca. Ab.* 188; and 2 *Stra.* 1125.

The case of the *D. Marlborough v. L. Carlisle*, mentioned at the bottom of page 612, is that of the *Duke of Marlborough v. Lord Godolphin*, 2 *Ves.* 61. *Quod vide.*

(3) See the Rep. p. 614; likewise *Goodwyn v. Goodwyn*, 1 *Ves.* 226, and the note thereon, *antea*, 117. Et vide 2 *Cox, P. W.* 524, 525, note. See likewise *Bailis v. Gale*, 2 *Ves.* 48, and the note on it, *antea*, 268.

CLARK versus GUISE, July 1, 1755. [425]

(*Reg. Lib.* 1754. *A. fol.* 502.)

VOL. II. page 617.—Sir Thomas Clarke, Master of the Rolls for the Lord Chancellor.

A testator, reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real and personal estate; and bequeaths an annuity to A. for life, out of his real and personal estate. Such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. (1)

NOTES AND OBSERVATIONS.

(1) THE Master of the Rolls observes. p. 618 of the Report, that this case fell within the principle of *Milner v.*

Milner, where the Court rectified the testator's miscomputation.

So likewise if a testator directs payment of any larger certain sum mentioned to be due from him, than is the fact, the whole sum will be decreed. *Whitfield v. Clement*, 1 *Merivale Rep.* 402.

The Master of the Rolls there refers the principle in such instances to the civil law, observing "*falsa demonstratione legatum non perimi*;" the note whereon has (*inter alia*) the following extract applicable to the above points:—" *Quotiescunque ulla ratione major utilitas redundat in Creditorem, toties subsistit debitum creditori legatum. Redundat autem major utilitas vel ratione quantitatis, vel,*" &c. See pp. 404-5. See also *Barret v. Beckford*, 1 *Ves.* 519, *et antea* 219.

In the principal case the Court declared, "that the plaintiff was not obliged to accept of the sum of 500*l.* as the whole of the debt to be paid her out of the assets of the said testator; but that she was entitled to the whole of what should be found due to her, according to the directions therein after mentioned; together with the annuity of 50*l. per annum*, &c. These were,
[426] for the Master to take an account of what was due to her for the principal of the said sum of 680*l.* 2*s.* 4*d.* being the amount of a bill of exchange given her by the testator [and referred to in his will,] with interest from the date of it: and he was to take an account of what was due to her for any other sums of money disbursed by her on account of the testator since that time; and also of the arrears of the annuity." *R. L.*

FLIGHT *versus* COOK, July 1, 1755.

(*Reg. Lib.* 1754. *A. fol.* 576.)

VOL. II. page 619.—Bill *quia timet*. A. having disposed of part of a specific sum, which he had covenanted should be paid to B. on a contingency, decreed to secure it.

NOTES AND OBSERVATIONS.

THE case of *Lord Warrington v. Langham*, cited in the Report, p. 620, is in *Prec. Ch.* 89.

ANONYMOUS, July 3, 1755.

VOL. II. page 620.—Injunction extended to stay trial(1) in actions by a corporation for petty customs.
Bill for account of tolls.

NOTES AND OBSERVATIONS.

(1) SEE the Report, p. 621. An injunction, however, will be extended to stay trial, on a slight affidavit. Vide 13 *Ves.* 323, 324. All that is necessary to be stated in the affidavit to ground a motion for the purpose is, merely in general terms, that the party cannot [427] safely proceed to trial, until the answer is put in. See 2 *Dick.* 728, 729; 13 *Ves.* 323; and 2 *Ves. & B.* 41.

A party cannot, in the Court of Chancery, have an injunction to stay trial in the first instance, and must obtain the common injunction first. See 10 *Ves.* 450. It seems also that he cannot obtain it on the same day. *Ibid.*

See the Rep. p. 621. A bill lies for an account of tolls after an establishment of the right at law. Vide *Corporation of Carlisle v. Wilson*, and the cases there cited, 13 *Ves.* 276.

WALKER *versus* PRESWICK, July 5, 1755.

(*Reg. Lib.* 1754. *B. fol.* 347.)

VOL. II. page 622.—Lien.—Bill of sale of a ship assigns the property.

The contractor, who had been only paid half of the expenses of the building, having thereby the legal and equitable interest, is entitled to be paid his whole demand; and the parties interested or their estates must settle their proportions and rights between themselves.

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Parties.—As to the lien of a vendor of real estate for the purchase money.(1)

NOTES AND OBSERVATIONS.

(1) *VIDE* 1 *Vern.* 267; 2 *Vern.* 281; with Mr. *Raithby's* notes. See also 3 *Atk.* 273; 6 *Ves.* 475 and 752.

In the principal case the bill, which was merely against *Preswick*, and the representatives of *Lacey*, prayed that the defendants might satisfy the plaintiff out of the produce of *Lacey's* moiety; and in case such moiety should not appear to have been already really and fairly sold by *Preswick*, that he might, if there should be occasion, join in a sale, &c. : and that for the more effectual payment, &c. if occasion should be, *Preswick* might pay
[428] the balance due from him on account of the ship, upon the stated account mentioned in the bill.

Preswick stated, in his answer, that he sold the ship in 1752, to *R. Sollitt*, for 1240*l.* and that he received such sum, and in consideration of it executed a general bill of sale of the ship, in common form, to the said *R. S.* He submitted to the Court, whether, as the plaintiff delivered up the ship to *Lacey*, and accepted of the bills of exchange from him for his part or share, such half part of the ship was, at the time of *Lacey's* death, or of *Lacey's* sale thereof to him, the defendant, specifically liable to the payment or satisfaction of the plaintiff's demands; and insisted, that he, having purchased such moiety for a full and valuable consideration, really paid by him, ought not to be obliged to pay the plaintiff's demands, or any part thereof; but that the same ought to be paid by the executors of *Lacey*, who received the purchase-money for such moiety from him, the defendant. It is observable, that *R. Sollitt*, the assignee from *Preswick* of his whole interest in the ship, was not made a party to the suit. The decree directed an account of what was due to the plaintiff, with interest at five *per cent.*; and that *Preswick* should pay the amount,

“so as the same did not exceed the sum of 620*l.* being one moiety of the purchase-money for which he sold the said ship; together with the plaintiff’s costs of the suit, &c.” And in case *Preswick* should do so, then *Lacey’s* representatives were to reimburse and pay him so much as he should have paid for principal and interest; and also one moiety of the costs out of *Lacey’s* assets, &c. &c.

DRINKWATER *versus* FALCONER, [429]

July 8, 1755.

(*Reg. Lib.* 1754. *A. fol.* 573.)

VOL. II. page 623.—Legacies.—Specific legacy, if existing, the whole paid, though nothing left for pecuniary; but if not existing, the right is gone. A debt specifically bequeathed, and afterwards voluntarily paid in, no ademption of the legacy; if a compulsory payment, it may or may not be an ademption according to circumstances; for if a particular reason is given, or if replaced on same fund, or so ordered, it is no ademption. Bequest of a note for 500*l.* “in the hands of F.,” when F. had laid it out in stock unknown to testatrix. Though the bequest of the note is specific, the legatee shall have the stock in which it is vested.(1)

NOTES AND OBSERVATIONS.

THE case of *Carew v. Carew*, cited p. 625 of the report, is also cited in the same vol. p. 564. It is rep. 2 *Atk.* 366.

(1) The court (*inter alia*) declared, “That the defendant *T. Bowe*, was entitled to the 450*l.* S. S. Annuities; together with the sum of 38*l.* 15*s.* in the hands of *Fisher*; which annuities and money were the produce of the note for 500*l.* specifically bequeathed to him by the codicil of the said testatrix.”

BRIDGMAN versus GREEN, July 9, 1755.

(*Reg. Lib.* 1754. *A. fol.* 548.)

VOL. II. page 627.—This decree was afterwards affirmed on a re-hearing.

See Lord C. J. Wilmot's cases and opinions, &c. page 58, &c. Relief against deeds obtained by fraud and imposition.(1)

Conveyance for consideration not afterwards to be set up as a gift; and being for fictitious consideration, inserted by the grantee himself, though found a gift by a jury, set aside in equity.(2)

Interest obtained through fraud cannot be maintained by third persons, though not themselves parties to the imposition.(3)

NOTES AND OBSERVATIONS.

(1) SEE this case on the re-hearing; Lord C. J. *Wilmot's cases* and opinions, 58: likewise [430] *Nantes v. Corrock*, 9 *Ves.* 182; *Hatch v. Hatch*, *ibid.* 292; and *Huguenin v. Baseley*, 14 *Ves.* 273, with the cases referred to.

(2) VIDE *Clarkson v. Hanway*, 2 *P. W.* 203.

(3) See the principal case *Wilm.* 64, and that case as enforced by Lord Eldon, C. 14 *Ves.* 289.

ANONYMOUS, July 9, 1754.

VOL. II. page 629.—Rolls.—Though the Court decreed specific performance of an agreement to let the plaintiff into a trade, it refused to direct an account of the profits, from the time the plaintiff ought to have been admitted; his remedy for that having been at law.(1)

Where a trustee has an infant's money to lay out for his benefit, and employs it in his trade, the Court will give an option for the benefit of the infant, either to have interest, or the profits of the trade.(2)

NOTES AND OBSERVATIONS.

(1) QUERY, whether, as the Court saw reason for its interference, it ought not to have directed an account or an

issue *quantum damnificatus*, at the least? Et vide in *Graham v. Graham*, 1 *Ves.* 262, *et antea* 134.

(2) *Dictum*. See the Rep. p. 630. Et vide accordingly *Raphael v. Boehm*, 11 *Ves.* 92; 13 *Ves.* 413 and 580.

ANONYMOUS, July 12, 1755. [431]

VOL. II. page 630.—Injunction.

NOTES AND OBSERVATIONS

WITH reference to what Lord *Hardwicke* says, page 630 of the report, that it is a motion of course to proceed to make bail at law liable, notwithstanding an injunction, the profession in general should be aware of the boundaries and distinctions of practice, as exemplified in the case of *Bullen v. Ovey*, 16 *Vesey*, 141. A party was there held to have committed a breach of an injunction, by having ruled the sheriff to bring in the body, where the bail, after having been excepted to, had not been justified agreeably to notice. The effect of an injunction, in the Court of Chancery is there clearly distinguished.

Before an action commenced, (by the delivery of a declaration) it stays all process; after action commenced, it allows the defendant to call for a plea, and proceed to judgment, if in a condition to do so. See also 18 *Ves.* 488.

ANONYMOUS, July 12, 1755.

VOL. II. page 631.—Any record of the Court may be referred for scandal at any time; [and even by strangers to the suit](1); but is otherwise as to a reference for impertinence. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived.(2)

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NOTES AND OBSERVATIONS.

(1) SEE *Fenhoulet v. Passavant*, 2 *Ves.* 24, *et antea* 260; *Caffin v. Cooper*, 6 *Ves.* 514. *Anon.* 5 *Ves.* 656, &c.

[432] (2) The third edition takes notice, that Lord *Thurlow*, C. seemed to disapprove of Lord *Hardwicke's* decision and observations in the principal case; referring to *Kinworthy v. Allen*, 1 *Bro.* 400. See nevertheless, 5 *Ves.* 656; and *Pellew v. ———* 6 *Ves.* 456.

With regard to what Lord *Hardwicke* says in the report, as to two terms being allowed to file exceptions, it is now settled, that a plaintiff has two terms and one vacation, on application to file them *nunc pro tunc*.

HINTON *versus* HINTON, July 14, 1755.

(No Entry.)

VOL. II. pages 631 and 638.—A copyholder contracts, for valuable consideration, to sell his copyhold lands to his son, but dies before an actual surrender; the son held entitled to have the agreement fulfilled, and to a surrender from the widow of her free-bench. (1)

Assignees of a bankrupt take the property subject to all equities, affecting the bankrupt. (2)

NOTES AND OBSERVATIONS.

(1) *S. P. Brown v. Raindle*, 3 *Ves.* 256.

(2) See the Rep. p. 633; *et vide* 13 *Ves.* 188.

Carr v. Singer, mentioned p. 639 of the report, is in 3 *Ves.* 603. *Moor v. Moor*, cited *ibid.* is in 2 *Ves.* 596. *et antea* 422.

MATHEWS *versus* MATHEWS,

July 15, 1755.

(*Reg. Lib. 1754. B. fol. 452.*)

VOL. II. page 635.—A debtor bequeaths a much larger legacy, upon a condition, which by a subsequent deed, it becomes impossible to perform, by the will it would not have been a satisfaction, as it was for another purpose; but being freed from the condition by the deed, it is a satisfaction. (1) General rule that a legacy larger than, or equal to, a debt, is a constructive satisfaction; but any minute circumstance is laid hold of to take it out of that rule. (2)

NOTES AND OBSERVATIONS.

(1) [To cause a legacy to be a satisfaction for a debt, it must be exactly of the same nature and certainty; and an apparent intention of the testator ought to appear. *Prec. Chan.* 394; 1 *Wms.* 408; 2 *Wms.* 553, 616, 1 vol. 521, 126; 2 *Atk.* 300; vide 3 *Wms.* 227, where the Master of the Rolls said, if testator intended a legacy as a satisfaction of a debt, he would have taken notice of it; and cited a decree of Lord *Harcourt's* in *Salk.* 508, for that purpose. Vide 1 *Wms.* 410, note, fourth edition, where the cases on this subject are collected.] Note to the third edition.

(2) See *Richardson v. Elphinstone*, 2 *Ves.* jun. 463; *Tolson v. Collins*, 4 *Ves.* 483; and *Hinchcliffe v. Hinchcliffe*, 3 *Ves.* 516; with the observations on it, 6 *Ves.* 325, 398, 400, 402.

In the principal case the Court (*inter alia*) declared, that the annuity of 700*l.* a year, devised to *T. M.* the son, was to be deemed a satisfaction of what he was entitled to under the agreement of 1733. And also, that the deed of 1750, being subsequent in time to the will of the testator, was to be considered as a new agreement between the father and son, and amounting to a release of the condition concerning Mrs. *Burgess's* annuity, annexed by the said will to the devise of the said 700*l.* a year. *R. L.*

ANONYMOUS, (1) *July 21, 1755.*

VOL. II. page 661.—Interest not allowed on arrears of jointure, except on a very special case indeed. (2)

NOTES AND OBSERVATIONS.

(1) THE name of this case was "*Bicknell v. Brereton*." See 2 *Ves. jun.* 167.

(2) Vide *Creuze v. Hunter*, 2 *Ves. jun.* 157, &c. and the notes to *D. Bedford v. Coke*, (2 *Ves.* 116) *antea* 293.

LEECH *versus* TROLLOP, *July 21, 1755.*

(*Reg. Lib.* 1754. *B. fol.* 402.)

VOL. II. page 662.—Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds by her answer, until the offer is effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises therein comprised. (1)

NOTES AND OBSERVATIONS.

(1) SEE 1 *Ves.* 450, and 1 *Atk.* 52.

ANONYMOUS, (1) *July 21, 1755.*

(*Reg. Lib.* 1754. *A. fol.* 538.)

A prior mortgagee may tack a subsequent judgment; but a prior judgment creditor obtaining a subsequent mortgage, cannot. A prior mortgagee, however, cannot tack a bond debt against the mortgagee, his assignee of the equity of redemption, or creditors; though he may, as against the mortgagee's heir, to prevent a circuitry. (2)

NOTES AND OBSERVATIONS.

(1) THE name of this case is *Jackson v. Langford*.
[437] (2) See *Jones v. Smith*, 2 *Ves. jun.* 372, 376, &c.; *Adams v. Claxton*, 6 *Ves.* 226; and *ex parte Knott*, 11 *Ves.* 609.

PAWLET *versus* DELAVAL, *et e contra*,
July 28, 1755.

(Reg. Lib. 1754. B. fol. 480.)

VOL. II. page 669.—A wife barred of all claim as to her separate estate by her own acts, in concurrence with the trustee and her husband in his lifetime, and by her affirmance afterwards.

NOTES AND OBSERVATIONS.

(1) SEE *Clinton v. Hooper*, 1 *Ves.* jun. 173. Et vide *Allen v. Papworth*, 1 *Ves.* 163, *et antea* 88; *Milnes v. Busk*, 2 *Ves.* jun. 488; *Whistler v. Newman*, 4 *Ves.* 129, &c. with the cases therein collected. Also *Sperling v. Rochfort*, 8 *Ves.* 164, 175; *Chaplyn v. Smith*, *ibid.* 183, per Lord Eldon, C. 9 *Ves.* 188; *Jones v. Harris*, 9 *Ves.* 486, 497; *Wagstaff v. Smith*, *ibid.* 520; *Richards v. Chambers*, 10 *Ves.* 580; and the cases there referred to.

With regard to what is said at page 669 of the Report, relative to gifts of a wife's separate property to her husband, it ought to be observed, that such a gift is never to be inferred without very clear evidence. See *Rich v. Cockell*, 9 *Ves.* 369; *Harvey v. Ashley*, cited p. 671, is in 3 *Atk.* 607.

Vide *Hargr. Co. Litt.* note to fo. 37, a.

Ex parte GARDNER, July 28, 1755. [438]

VOL. II. page 671, 672.—The Court refused to pay a wife's money to her husband, though she consented in Court, and had no children; proposals having been formerly made to settle an equivalent in strict settlement, but which the parties wished to abandon.

NOTES AND OBSERVATIONS.

THE refusal of the Court in the principal case seems founded on the possibility of there being children, who, the Court held, would be entitled to have the proposal ef-

BRIDGMAN versus GREEN, July 9, 1755.

(*Reg. Lib.* 1754. *A. fol.* 548.)

VOL. II. page 627.—This decree was afterwards affirmed on a re-hearing.

See Lord C. J. Wilmot's cases and opinions, &c. page 58, &c. Relief against deeds obtained by fraud and imposition. (1)

Conveyance for consideration not afterwards to be set up as a gift; and being for fictitious consideration, inserted by the grantee himself, though found a gift by a jury, set aside in equity. (2)

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ANONYMOUS, July 12, 1755. [431]

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VOL. II. page 631.—Any record of the Court may be referred for scandal at any time; [and even by strangers to the suit] (1); but is otherwise as to a reference for impertinence. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. (2)

fectuated; and there seems little doubt, but a similar decision would now ensue on a case exactly so circumstanced.

There seems, however, no little inconsistency in the decisions with regard to the Courts of Equity allowing or refusing a *feme covert* to dispose of her property, even upon her consent, in Court, and where it was untouched by any kind of obligation. In *Willats v. Cay*, A. D. 1740, the Master of the Rolls allowed it, though the husband was insolvent. In *ex parte Hgham*, A. D. 1754 (2 *Vesey* 579, *et antea* 419,) Lord *Hardwicke* refused it, though the husband was not insolvent, and wished to employ it beneficially in his trade. In *Dimmock v. Atkinson*, in 1790, (3 *Bro.* 195,) the Lord Chancellor held the application irresistible, though much opposed. The opinion of the Master of the Rolls was to the same effect in 1795. See 2 *Ves.* jun. 677, from whence the modern practice seems to be now so established that in a much later case, *viz.* in 1804, Lord *Eldon*, C. lays it down as clear, that a wife may waive her equity for a settlement, even after an order for it pronounced; and at any time before its actual completion. See 10 *Ves.* 88.

[439] *WILSON versus HARMAN, July 29, 1755.*

(*Reg. Lib.* 1754. B. fol. 263.)

VOL. II. page 672.—Tenant for life of lands to be purchased with S. S. Annuities, dying in the middle of a quarter, no apportionment of the dividends in favour of his representatives. If the land had been purchased, there would be no apportionment in such a case; (1) and there is no apportionment on dividends in the public funds.

NOTES AND OBSERVATIONS.

(1) In that part of the Report where Lord *Hardwicke* considers the question as applicable to land actually purchased, his Lordship seems impressed by the old maxim

of "rent being incident to the reversion:" and it seems clear, that if the land had been purchased, the case would not have fallen within the provisions of the statute for the apportionment of rent, 11 Geo. II. c. 19, s. 15; that act being referable only to demises or leases determinable on the death of the tenant for life.

GARFORTH *versus* BRADLEY, Oct. 25, 1755.

(No Entry.)

VOL. II. page 675.—Baron and Feme. Wife's choses in action unreduced into possession. (1)

NOTES AND OBSERVATIONS.

(1) As to the rights of the husband and those claiming under him, or standing in his place, relative to the wife's choses in action, &c. vide *Druce v. Dennison*, 6 *Ves.* 385, &c.; *Mitford v. Mitford*, 9 *Ves.* 87; *Wildman v. Wildman*, *ibid.* 174; *Carr v. Taylor*, 10 *Ves.* 574; *Wright v. Morley*, 11 *Ves.* 12; *Dorwell v. Earle*, 12 *Ves.* 473; *Baker v. Hall*, *ibid.* 497; *Baker v. Serra*, 14 *Ves.* 313.

MITCHELL *versus* NEAL, Nov. 8, 1755. [440]

(*Reg. Lib.* 1755. *B. fol.* 7.)

VOL. II. page 679.

NOTES AND OBSERVATIONS.

WITH regard to what is stated in the margin, &c. at the bottom of the page in the Report, referring to *Richards v. Evans*, [1 *Ves.* 33;] *Chapman v. Hart*, [2 *Ves.* 506;] and *Carte v. Ball*, [1 *Ves.* 3.] Vide *antea* 35, 128 and 4. Et per Lord Eldon, C. in *O'Connor v. Cook*, 6 *Ves.* 671. His Lordship there observes, "Courts of Equity in ancient times were more in the habit of taking on themselves the decision of questions of fact, in such instances, than they

have thought wise and discreet in later times. All the Judges have, of late, thought it more wise and discreet to send the question of fact to a jury, where any reasonable doubt."

WILLIAMS *versus* JEKYLL, and
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(*Reg. Lib.* 1755. *B. fol.* 219.)

VOL. II. page 681.—S. P. 1 Scho. & Lefr. 281. Lease for three lives to A. her executors, &c. (1) A. assigns all right to the use of B. for life, and afterwards of his issue; and for want of such issue, to the use of A. her executors, &c. The whole vests in the issue of B. and means children; and A.'s executor, who was a special occupant, cannot claim against it. (2)

NOTES AND OBSERVATIONS.

(1) THE interest in estates "*pur autre vie*," to a person, "his executors, &c." beyond the debts, belongs to those who are entitled to the personal estate, and the executor was held a trustee for the residuary legatee. Vide *Ripley v. Waterworth*, 7 *Ves.* 425, &c. and 450, 551.
[441] (2) *S. P. Campbell v. Sandys*, 1 *Schoales & Lefroy*, 281.

As to the case of *Forth v. Chapman*, cited in the report, p. 683, see 3 *Atk.* 288.

With regard to what appears at the bottom of page 683, see per Lord *Eldon*, C. in *Ripley v. Waterworth*, 7 *Ves.* 450, 451.

The decree in the principal case is stated in 1 *Scho. & Lefr. Rep.* 291; but it is not very material.

* WILLOUGHBY AND WILLOUGHBY,

In Chancery, *June 19, 1756.*

Reported from the MS. notes of Lord Chancellor *Hardwicke*, by *Durnford & East* [1 T. R.] 763.

VOL. II. page 685.—* This case is not reported in the folio edition; and is taken, as it appears here, from the third or Irish edition.

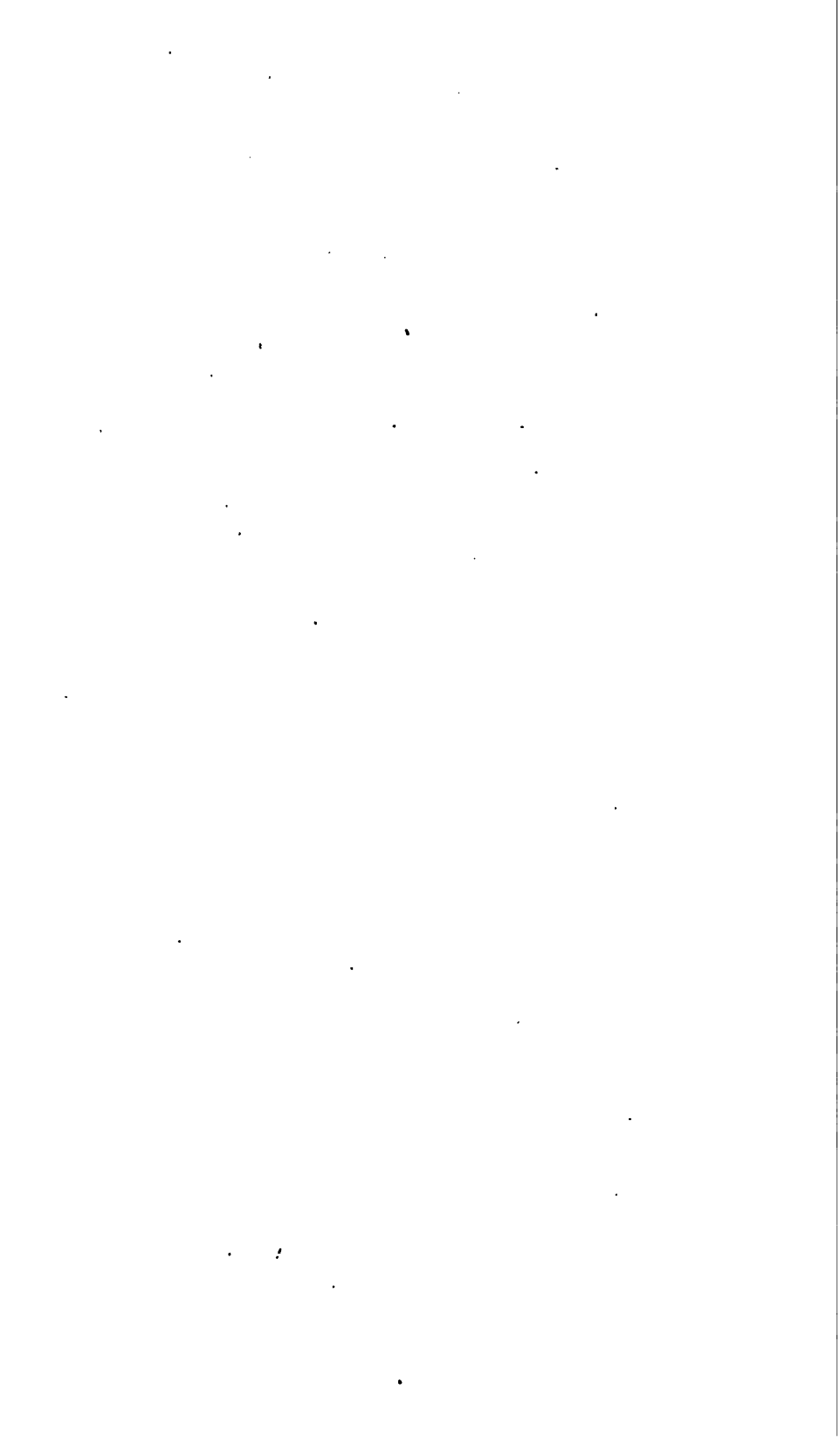
NOTES AND OBSERVATIONS.

* WHERE a subsequent purchaser, or mortgagee, who, *pro tanto*, is a purchaser, has notice of a former purchase or incumbrance, he cannot avail himself of an old outstanding term prior to both, in order to get a preference: but if he has no notice of such prior purchase or incumbrance, and having the best right to call for the legal estate, gets an assignment of it, equity will not deprive him of the benefit of it; for a purchaser *bona fide* for valuable consideration, and without notice cannot be hurt in equity, nor have the benefit of the law taken from him.

Notice makes him come fraudulently. Also, [442] where a second mortgagee of an estate, on which there is an old outstanding term, has notice of an incumbrance prior to his own; as he has not the legal estate in him, nor the best right to call for it, the whole title and consideration being in equity, the general rule must take place, *viz.* † “Qui prior in tempore potior est jure,” and the prior incumbrancer may satisfy himself of any other incumbrances on the estate, though unknown to the puisne mortgagee when he advanced the money.

* 2 Ves 485, 486.

† 2 P. W. 496.



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20. Bond by a woman about to marry, without her intended husband's knowledge, but for valuable consideration in respect of an antecedent debt. Held, the husband could not be relieved against it. Concealment, however, of such securities and debts not to be

- encouraged. *Blanchet v. Foster.* Page 337
21. Where a suit is relative to the separate estate of a wife, the bill ought to be filed by her *prochein amy*. If, however, such a suit be instituted by the husband and wife jointly, the Court will secure the fund for the wife, in the name of trustees, or the accountant general. *Griffith v. Hood.* 382
22. Husband suing for the wife's property, must make a settlement. If he is out of the jurisdiction, or otherwise leaves his wife unprovided for, the Court will order payment of the wife, till he returns and maintains her properly.—*Sleech v. Thorington.* 415, 416
22. The Court refused to let the whole of a wife's fortune be paid to her husband, although she was present in Court, and consented to it. *Ex parte Higham.* 419
23. Though a settlement be made on a wife before marriage, if a great accession of fortune happen to the wife afterward, the Court will direct a further settlement out of it, if it once obtain jurisdiction. *Tomkyns v. Ladbroke.* 421, 422
24. A wife barred of all claim as to her separate estate by her own acts, in concurrence with the trustee and her husband in his life-time, and by her affirmation afterwards. *Pawlet v. Delaval.* 437
25. The Court refused to pay a wife's money to her husband, though she consented in Court, and had no children;

- proposals having been formerly made to settle an equivalent in strict settlement, but which the parties wished to abandon. *Ex parte Gardner.* Page 438
26. As to the wife's choses in action, not reduced into possession. *Garforth v. Bradley.* 439

BASTARD.

- Question, as to whether a bastard could take under the denomination in a will, of "eldest son," by way of *descriptio personæ*, the testatrix knowing of his existence, and believing that there was no lawful issue. *Baker v. Baker.* 319

BONDS.

See Also POST OBIT BONDS.

1. Bond *ex turpi causa*, decreed to be delivered up. *Robinson v. Gee.* 131, 132
2. As to the ancient and established jurisdiction of Courts of Equity on lost bonds; and the modern assumed jurisdiction of the Courts of Law in such instances, without profert. *Walmsley v. Child.* 163. See also *Whitfield v. Fawcet.* 169, 170. *Glynn v. B. of England.* 266. *Askew v. Poulterers' Company.* 284
3. Assignment of Bond to co-obligor, who pays it, is of no use; since even the principal may plead payment to an action in the name of the obligee. Action, however, lies on the case, and perhaps indebitatus assumpsit. *Woffington v. Sparks.* 418

C.

CASE FOR A COURT OF LAW.

Where an estate, subject to a question of law, is of small value [and a Court of Equity does not think proper to decide it], the Court will direct a case to be argued and heard before two Judges at Chambers, instead of being set down in the special paper of the Court at Law. *Rigden v. Vallier*. Page 335, 336

CHARGE.

See also EXONERATION.

1. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them. *Leman v. Newnham*. 40
2. Under a devise that all testator's debts "should be first paid and satisfied." Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all. *Earl of Godolphin v. Penneck*. 341
3. Charge by will of the whole real estate in aid of personal for debts and legacies, not restrained by the subsequent devise of a particular part for that purpose, without negative words. *Ellison v. Airey*. 417

CHARITIES.

See also MORTMAIN.

1. Though an information relative to a charitable use will

not be dismissed on any formal grounds, where a clear right is to be settled, it will yet be dismissed with costs, if no charitable funds in question, and no distinct ground made out in proof for the Court's interference. *Attorney General v. Parker*.

Page 37

2. Though an information relative to a charity, where the subject is fit, and the Court has proper jurisdiction, will not be dismissed because it prays wrong relief, &c. it is otherwise in many cases where the Court may not think proper to interpose; and an information will always be dismissed with costs, if the Court has not properly full jurisdiction, as in foundations under a charter, &c. *Attorney General v. Smart*. 53
See also pl. 9 and p. 354.
As to the late act for the regulation of charities on petition only, see p. 53
No precise words requisite to constitute a visitor. 53, 60
3. The nomination of a master to a charity school, not subject to the general rules of lapse, as in cases of presentations to livings. *Attorney General v. Wycliffe*. 60
4. As to where the Courts have favoured valid bequests and donations for charitable purposes, 116
5. Void devise under the Mortmain Acts. *Durour v. Motteux*. 157
6. Disusage held evidence of abandonment by consent, as to part of a constitution, which

- arose from consent. *Attorney General v. Scott.*
Page 182, 3
7. Devise of a house to a college, not for academical or collegiate purposes, but merely to make it unalienable, held void. *Attorney-General v. Whorwood.* 236
 - Rights of the Crown to direct the use of a charity, contrary to law; or where the purposes expressed are too general and indefinite. 236
 8. Assets not marshalled in support of a devise contrary to law as a gift to charity. Money directed to be laid out in lands for such an illegal purpose, shall not be laid out for the heir, but the trust is void altogether. As to the testatrix's real estate which was devised to be sold, partly for such purposes, the heir was declared entitled to the surplus proceeds. *Mogg v. Hodges.* 269
 9. A free school founded by charter, with proper powers, must be regulated in the first instance by the charter, not by application to the Court of Equity. No formal words necessary for the appointment of a visitor, but the visitatorial power not to be extended. The rule that an information for a charity is not to be dismissed, if the party has failed to pray the proper relief, holds only in those cases which the Court thinks proper for its interference at all, and the information here being improper, was dismissed with costs. *Attorney-General v. Middleton.* 354
 10. Lord Hardwicke's opinion in the latter part of the Judgment, has been over-ruled, and the term "erecting," as applied to Charities, is now held to mean the substantial part of the gift, not the mere building of any tenements. *Attorney General v. Bowles.* Page 404
 11. Where trustees of a Charity have discretionary powers, the Court will not interpose unless they act corruptly. Though it may not choose to interpose, it does not follow that an information, seeking the Court's interference, will be dismissed; since it may be serviceable to maintain a control over them. Where there is, in point of substance, a visitor, it excludes the general interference of the Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. *Attorney General v. Governor of Harrow School.* 406

CHATTEL.

Entail of. See ESTATE TAIL.

CHOSE IN ACTION.

See also BARON and FEME.

1. Wife, surviving her husband, bound by his covenant as to a Chose in Action, which became a vested interest in his life-time; and which he therefore might have disposed of. *Bush v. Dalway.* 20
2. Neither choses in Action, nor securities for money, pass under a bequest of "goods and chattels." *Chapman v. Hart.* 139

CLERK IN COURT AND
SIX CLERKS.

Voluntary release by a party to his adversary not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a bona fide compromise for a reasonable consideration paid, it would have been otherwise. *Anonymous*. Page 261

2. As to rights and remedies of Six Clerks and Clerks in Court, for their fees; their lien on papers, &c. Whether Six Clerk can stop proceedings until paid his fees, which had been paid to the Clerk in Court of his division, who had absconded. *Taylor v. Lewis*. 290

CODICIL.

See also REVOCATION, &c.

See *Fuller v. Hooper*. 333

CONDITION.

1. A person having power to appoint 4000*l.* to any of her kin, and for want of appointment, to go according to the statute, appointed it to her nephew, "upon condition" that he paid his mother (one of the next of kin) an annuity. Though the nephew died in her lifetime, whereby the appointment, as to him, became void, his mother held entitled to her annuity. *Oke v. Heath*. 82

An ulterior appointment to a niece of all the rents, &c. of what she had power to dispose of, "held to pass the residue of the above sum which had thus lapsed. *ibid.*

2. Gift on condition to marry

with consent, where good, and where only in terrorem. *Berkeley v. Ryder*. Page 402

3. Provision by a brother in favour of sisters, otherwise unprovided for, "upon their marrying with consent," construed as if made by a father. Such a provision, *aliter*, if made by a mere stranger. *ibid.*

CONDITIONAL LIMITATION.

Devisee, on condition that the land should go over to another, if he did not give a release in three months after the testator's death, dying in the testator's life-time, the devisee over shall take instead of the heir at law; this being a conditional limitation, and not a strict condition. *Avelyn v. Ward*. 183

CONFIRMATION.

Sale of a seaman's prize money, and subsequent agreement in confirmation of it, set aside. *Taylor v. Rochfort*. 345

CONSENT.

Decree by consent refused to be set aside. *Harrison v. Rumsey*. 391
Vide contra, however, *Butterfield v. Butterfield*. 81

CONSIDERATION.

1. A good and valuable consideration in settlements, &c. will run through all the limitations in favour of the remotest remainder-men. *Stephens v. Trueman*. 53
2. The consideration, as between the immediate parties to marriage settlements, will

pervade all the limitations for the benefit of the remotest, and for those, in respect of whom, the debt would otherwise have been voluntary. *Ithell v. Beane.* Page 114

3. Settlement after marriage, if a portion paid, is on good consideration, and equal to one made before marriage. *Ramsden v. Hylton.* 350

CONSTRUCTION.

1. Of will as to real estate, made by reference to directions concerning the personalty. *Hawes v. Hawes.* 15
2. "Or," substituted for "and," to effect the plain intent. 21
3. A sale directed in favour of creditors, on a devise of "rents and profits" alone, and although contrary to the testator's intention: held otherwise as to legatees, under the same instrument. *Baines v. Dixon.* 36
As to the natural and primary meaning of such directions, *per se.* *Vide* 36, &c.
4. Construction of a trust as to surplus rents: held these were not included under the term "Portion." *Vane v. Vane.* 45
5. The word "Relations," generally speaking, does not include those by affinity. A wife, therefore does not answer such a description in the ordinary sense. See *Davies v. Bailly.* 62, 63
6. Bequest by an East India Captain of "All household furniture, linen, plate, and apparel," includes only what is for domestic use, and not any articles for trade or merchan-

dize. *Le Farrant v. Spencer.* Page 68

7. Medals, when to pass by a bequest of money, &c. *ibid.* Construction as to the words "or" and "and." *ibid.*
8. The word "Grant" does not amount to an entire warranty in Equity; nor always at law, as where particular covenants are inserted. *Clarke v. Samson.* 69
9. Construction of Deed—grandchildren and great grand-children included by the term "issue;" and the word "children," following it, explained as meaning "issue" likewise. *Wyth v. Blackman.* 110
10. After born children included in a devise to "A's children." *Goodwyn v. Goodwyn.* 117
What passes by the term "Estates," either alone, or with the addition of other words. *ibid.*
11. Bequest "to such of nearest relations" as A. should think poor, and "objects of charity," confined to those within the statute of distributions, under A.'s advice. *Goodinge v. Goodinge.* 122
12. Construction of will—Interest of legacy from the death of the testator on the manifest intent as to maintenance. *Beckford v. Tobin.* 153
13. Devise of real and personal estate in trust for the nearest relation "of the Pyots." The latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the

- name of Pyot, by marriage, held not to exclude. *Pyot v. Pyot*. Page 161
14. Second born son may take under a limitation "to the first son," he being so at the time. *Lomax v. Holmden*. 152
15. Devise of "all lands and tenements in or near F. by a will attested by only two witnesses, where the testator had freehold, will not pass leasehold. It would have been otherwise if he had only had leaseholds. *Chapman v. Hart*. 138
16. Power of appointment, by a father not well executed according to a reasonable construction of the recital of the deed which created the power. *Burleigh v. Pearson*. 143
- "And" construed "or." 143
17. "Or" construed "and." 182
18. Courts of Law and of Equity will equally transpose words in instruments to make the limitations intelligible, and attain the party's clear intent; but never to defeat the interests given, or let in more than expressed. 279
19. Younger son becoming an eldest, entitled to take *en nomine*. Devise of house and appurtenances to wife during widowhood; but that the eldest son when 21, or married, might have it, on notice. The wife having married after the death of a former eldest son unmarried, and during the minority, &c. of the existing eldest son; it was declared that he would be entitled to the enjoyment on attaining 21, or marriage, upon giving notice. The intervening interest in the premises and appurtenances, being indisposed of, held to fall into the residue of the real and personal estates respectively. *Duke of Bridgewater v. Egerton*. Page 296
20. An express estate for life not enlarged by implication, unless necessary; as to preserve the clear intent for a line in succession. The words "dying without issue," construed in respect of personal estate, in the popular sense; so as to preserve the limitations over. *Vaughan v. Farrer*. 322, 323
21. Repugnant words in a will may be rejected or transposed. In this case the Court rejected a repugnancy by interlineation. Bequest of the use and enjoyment "of every thing else at my house," means such things as are proper to go with the house as heir-looms, viz: fixtures and ornaments, not watches, &c. &c. Estate for life in lands, by implication, rebutted by the party having a bequest for life in a particular part of them, and by testator desiring she should not be turned out. *Boon v. Cornforth*. 345
22. A general release with a particular consideration recited, will be construed according to the particular recital. *Ramsden v. Hylton*. 350
23. Wills construed to charge real estates by implication for

the benefit of creditors: such implication, however, may afterwards be destroyed.—

Thomas v. Britnell.

Page 352

24. After a bequest before the Mortmain Act of £50 charged on land to P. J. the minister of a Baptist meeting house, certain other premises were devised away, charged with an annuity of £10 "to the minister belonging to that meeting house;" this held a valid charitable bequest for the ministers in succession, and not personal to P. J. *Attorney General v. Cook.*

343

25. Covenant in marriage articles that lands were of a certain value, which they were not: husband by will "confirms the articles, and also gives his wife all his lands in A. B. for life." Held not to be a question of satisfaction, or part performance, but of construction; and that the wife was entitled to both interests under the intent thus collected. Further covenant from the husband, "inasmuch as he was to be absolutely entitled to all the wife's personal estate," to settle "in respect of any sum that might come to her afterwards after the rate of £100 per annum on her for life, for every £1000; and upon certain contingencies, that she should be paid back a moiety of all that he should receive as her portion." The husband obtained a Decree for £400 of the wife's money, but did not receive it: held, she was enti-

tled to a settlement according to that proportion; and the contingencies having happened, to the moiety likewise of all sums received, including the £400 since the husband might have received it.—*Prime v. Stebbing.*

Page 370

26. Annuity by will to a wife, otherwise unprovided for; and sums for children's maintenance. On a deficiency of assets; held, on the intention of the testator, that they should not abate in proportion with the general legacies. *Lewin v. Lewin.* 372

27. Arrears of annuity held to pass under a bequest of "all arrears of rent and interest due."

China held to pass under a bequest of "furniture." Storetea contra. *Hele v. Gilbert.*

377

28. Devise of real and personal estate to the first son of A. when he shall attain 21, with a direction for his proper maintenance and education. A. having no son at the time of the will, the testator's death, or the Decree; held that the profits of the personal estate should accumulate; that as to the real estate, it was a good executory devise, but that the profits thereof descended to the heir until a son should be born, when they should be applied to his maintenance, &c.

Devise of all real and personal estate "in trust" by "B. C. D." &c. must be construed by the subsequent acts to be done by them, and amounted

- here to a devise "to" them. *Bullock v. Stones*. Page 397
29. Bequest to "near relations" mean those within the statute of distribution. *Whithorne v. Harris*. 401
30. Bequest "to the two servants" that should live with the testatrix at her death: she had three at a time, and all of them entitled. *Sleech v. Thorington*. 415, 416

CONTEMPT.

Publisher of advertisements as to proceedings in Court committed for a contempt, but discharged on his submission and full disclosure. *Anonymous*. 396

CONTINGENCY.

1. Bequest of a contingent interest in personalty void, where the preceding gift never vested, owing to a lapse. *Miller v. Faure*. 63
2. The Court will not direct money to be paid to the party entitled in remainder, upon the improbability of an intermediate event, if such event be possible. *Kirby v. Clayton*. 332

CONTINGENT ESTATE.

An estate being devised to R. "or his heir," on a contingency, and R. having conveyed all his right, title, &c. before the contingency happened, and then died, his heir has no claim. *Wright v.* 181

CONTINGENT REMAINDER.

See also REMAINDER.

1. Contingent remainder upon an executory devise. *Hopkins v. Hopkins*. Page 137
2. Questions as to legal and equitable recoveries, and trustees to preserve contingent remainders. *E. Portsmouth v. Lord Effingham*. 189

CONTRACT.

See also AGREEMENT.

1. Though specific performance of a contract might have been decreed against original parties holding as tenants in common; yet where an alteration prevented a Decree as to one moiety, the Court would not direct a performance as to the other, the contract being entire, and an execution of half of it inadequate to its prime object. *Attorney General v. Day*. 115
2. If a tenant in tail persists in refusing to execute his contract for sale, &c. and dies, the Court will not decree the succeeding tenant in tail to fulfil it; such a one taking paramount. *Attorney General v. Day*. 115

CONTRIBUTION.

See also APPORTIONMENT, EXONERATION, &c.

As to contribution and apportionment towards renewals of leases. See *Verney v. Verney*. 188

CONVERSION.

See PERSONAL ESTATE, HEIR, &c.

1. Conversion of real estate into personal. *Durour v. Motteux*. 157
2. Devise of real and personal

estate in trust for the nearest relation "of the Pyots." The latter held to be "*nomen collectivum*," and descriptive of that particular stock, and that this mixed fund should not go to the heir at law of that name. A change of the name of Pyot, by marriage, held not to exclude. *Pyot v. Pyot*. Page 161

CONVEYANCE VOLUNTARY.

1. A voluntary conveyance, by one lately come of age, to an agent of a reversion of no great value, for a nominal consideration of 180*l.* and containing covenants, as in the case of a purchase; not absolutely rescinded, as not being a case of fraud; but the transaction modified by Decree, that the agent should release the covenants at his own expense, and recite the impropriety of them as referable to a gift. [*Sed quære.*] *Cray v. Manfield*. 167
2. See TITLES, CREDITORS and PURCHASERS; and *Lord Townshend v. Windham*. 243 & 247

COPYHOLDS.

See also SURRENDER, &c.

1. Wife barred of *free-bench*, by settlement under agreement before marriage, to accept it in lieu of dower, or thirds. *Walker v. Walker*. 43
2. Surrender supplied in favour of younger children. *Banks v. Denshire*. 49
3. Trust of a copyhold devisable without a surrender. *Glen v. Poulton*. 76

As to another copyhold, of which the testator had the legal estate, the heir put to his election. Page 76

4. Devise of all testator's "real" and personal estate "subject to debts," there being no freehold lands, affects copyholds, for the benefit of the creditors. If there had been freehold, it would have been otherwise. *Ithell v. Beane*. 114

See also *Goodwyn v. Goodwyn*. 117

5. Devise to a Charity, before the statute of Mortmain, of copyholds unsurrendered, held good. *Attorney General v. Andrews*. 116
Copyholds pass by a will without any witness. *ibid.*
6. Devise of "all messuages, lands, &c." will pass copyholds, where the introductory words, &c. show the testator's meaning to dispose of all his estate. *Goodwyn v. Goodwyn*. 117
7. A person taking a benefit in real or personal estate under a will, must abide by it in toto. Therefore an unsurrendered Copyhold was decreed to pass. *Cookes v. Hellier*. 127

8. A surrender of Copyholds will not be supplied in favour of a wife or child, under a merely presumable intention to devise it. *Chapman v. Hart*. 138
9. As to trusts of Copyholds passing without a surrender. 204
10. A defect of a surrender of copyholds, &c. is supplied in favour of a widow, children, &c. without any statement

that they are unprovided for; but is not supplied in favour of grand-children.

It is supplied in favour of creditors, where no other real estate, under a general devise, after a direction to pay debts.

Tudor v. Anson. Page 420

11. Entail of Copyholds barred by a mere surrender to the use of a will, &c. where no peculiar custom showing the necessity of barring by recovery.

To show the customary estate tail it is necessary to show remainders, or such long enjoyment according to the limitation, as to exclude the supposition of a conditional fee.

Moore v. Moore. 422, 423

12. A copyholder contracts, for valuable consideration, to sell his copyhold lands to his son, but dies before an actual surrender; the son held entitled to have the agreement fulfilled, and to a surrender from the widow of her free-bench.—*Hinton v. Hinton.* 432

13. As to a surrender of copyhold estate by feme covert, with her husband's privity and consent, but without his having actually joined in the act. *Taylor v. Philips.* 258

14. Testator seized of freehold, and of copyhold estates unsurrendered, gives "all the rest, &c. of his estate, real and personal, to his wife, her heirs," &c. Held clearly, that the copyholds thus unsurrendered did not pass in Equity, there being nothing to designate such express intention; and sufficient to answer the words used of "real es-

tate" without them. It would have been otherwise in this case, if testator had not had any freehold estate, or having both, had expressly devised both, even although the copyhold was unsurrendered.

In cases where copyholds are clearly meant to pass, but are unsurrendered, the want of such surrender supplied only in three cases, viz. for the benefit of a wife, children, and creditors. Distinction between the supply of a surrender in favour of wife or children, and creditors.—*Byas v. Byas.* Page 315

15. Under a devise that all the testator's debts should be first paid and satisfied. Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts, the first disposition running over all. *Earl Godolphin v. Penneck.* 341

16. Particular customs of a manor as to mortgages. Equity of redemption will follow the custom attaching on the legal estate.

Not absolutely determined, whether trust estates or equities of redemption in Copyholds, *escheat* to the lord. *Fawcett v. Lowther.* 348

17. Quere, whether a trustee or his heir can claim admittance to Copyholds, or hold for his own benefit, where the *cestui qu'a* trust has died without heirs?

It is a question whether trust estates in copyholds *escheat* to the lord in such a case? If they do, and the trustee has

been admitted, it seems he would be considered as holding for the benefit of the lord; and decreed to surrender. If they do not escheat, the question is, who is entitled to the beneficial interest.

Page 348, 349.

It has been said, a Court of Equity would decree such an estate to be sold for the benefit of the next of kin; but that seems very doubtful. 349 Quere, therefore, whether, in such a case, the lord could refuse the trustee admittance; and if compellable by law to admit him, whether he would not be entitled to the assistance of a Court of Equity. *ibid.*

COSTS.

1. Book kept at the Six Clerks' Office, for entry of bills, which have not been filed, but on which process has issued, for the benefit of Defendants, who may "prefer costs," after their appearance in such a suit. 42, 43
2. Costs paid to a disinherited heir, where raising a fair question, and avoiding useless expense. *Stephens v. True-man.* 54
3. If redemption of mortgage be resisted when it should not, mortgagee will be ordered to pay costs. *Baker v. Wind.* 88
Where the question of mortgage or absolute conveyance had been decided against the mortgagee in an issue, he was on motion directed to pay the costs forthwith, and not allowed to set them off in account. *ibid.*
4. Right to principal and inter-

est generally carries costs. A tender must be very express and formal to prevent costs in such a case. *Gammon v. Stone.* Page 162

5. Costs are refunded upon the reversal of an order, which had allowed a demurrer.—*Oates v. Chapman.*

241, 287

6. Voluntary release by a party to his adversary, not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bona fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anonymous.* 261
7. In passing accounts of lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs. *Ex parte Wright.* 261
8. The next friend of an infant allowed costs, though the bill had been dismissed; the Master having previously reported the suit for the infant's benefit. *Taner v. Ivie.* 386
Sed vide ibidem.
9. Revivor is allowed for costs taxed. They die with the party unless taxed; and even where taxed in the life-time of such party, and the person who is to pay them is in prison, he will be discharged unless there be a revivor in a reasonable time. *White v. Hayward.* 385
10. Though the strict rule be not to allow revivor, merely for costs, which have not been taxed, the Court leans against enforcing it, if there be any thing in the Decree yet remaining to be perform-

- ed. *Johnson v. Peck.*—
p. 386. See also pl. 13.
11. The ancient sum of £40 as the amount in which security must be given to answer costs on the Plaintiff's residing abroad, is not increased under adverse motion, on any special circumstances. If, however, such a Plaintiff asks a favour of the Court, further terms may be imposed on him. *Gage v. Lady Stafford.* 413
12. After a Decree for an account, in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants, there is no occasion to give notice to creditors. Costs having been given here in the first instance, they were to be paid before debts, &c. *Hare v. Rose.* 413
13. Although, generally speaking, costs die with the party, if they have not been taxed, several exceptions are allowed to it; and revivor may be for costs alone, under particular circumstances. *Kemp v. Mackrell.* 419, 420
See also pl. 9, 10.
2. As to the distinction between cases of satisfaction and of part-performance, &c. Page 3
8. Covenant by lessee to re-build is not performed by repairing some, and re-building others. *City of London v. Nash.* 14
4. As to the propriety of the Court's interference in such cases. 15
5. Wife surviving her husband, bound by his covenant, as to a chose in action, which became a vested interest in his lifetime; and which he therefore might have disposed of. *Bush v. Dalway.* 20
6. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them. *Leman v. Newnham.* 40
The purchase of houses in London, and of lands of the tenure of borough English, held not to be a due execution of a covenant in marriage-articles to purchase or settle "lands of inheritance." *Pinnel v. Hallet.* 344
8. Bill, *quia timet*, *A.* having disposed of a specific sum, which he had covenanted should be paid to *B.* on a contingency, decreed to secure it. *Flight v. Cook.* 426

COVENANT.

Vide also SATISFACTION, PERFORMANCE, &c.

1. A husband covenanting to grant his wife by deed or will £1000 at his death, if she survive him, but dying intestate without having done so. Held that she was not entitled to her distributive share, in addition to her claim under the covenant. *Lee v. D'Aranda* [and] *Cox.* 1

CREDIT MUTUAL.

Under partnership agreement. *Welford v. Bezely.* 6 and 7

CREDITORS.

See also DEBTOR and CREDITOR.

1. Settlement after marriage, voluntary and void against

- creditors. *Beaumont v. Thorpe.* Page 25
- Contra, if on a fair consideration, though inadequate, if no fraud, or reasonable ground of suspicion. 26
2. A sale directed, in favour of creditors, on a devise of "rents and profits" alone, and although contrary to the testator's intention. Held otherwise as to legatees, under the same instrument. *Baines v. Dixon.* 36
3. A deed executed on the same day as a will, held to be a testamentary act, and void against creditors. *Peacock v. Monk.* 80
4. Devise of all testator's "real" and personal estate, "subject to debts," there being no freehold lands, affects copyholds for the benefit of the creditors. If there had been freehold, it would have been otherwise. *Ithell v. Beane.* 114
5. No preference allowed to a creditor who becomes an incumbrancer under a devisee in trust. *Ithell v. Beane.* 114
6. A daughter, being a creditor under her father, the testator's marriage articles, and having a legacy bequeathed to very near the amount, an account was directed as to the testator's personal estate at the respective times of making his will, and of his death. *King v. Philips.* 125
7. The grant of a menial office in the House of Lords for a term of years, liable to creditors; and a daily fee or allowance held liable also. *Shel-linger v. Blackesley.* 164
8. As a creditor being witness to a will, before the act 25 Geo. II. c. 6. *Pryse v. Lloyd.* Page 210
9. Voluntary conveyance by a person indebted at the time, void against subsequent purchasers for valuable consideration, and creditors. If the party is not indebted at the time, and no fraud, it is good, against creditors, though not against purchasers; by force of the statute 27 Eliz. c. 4. Difference between the statutes 13 Eliz. c. 5, and the 27 Eliz. c. 4.—*Lord Townshend v. Windham.* 247
10. Settlement after marriage on wife, &c. good against the husband's creditors and assignees, having been made in consideration of her parting with a contingent interest, secured by the bond of the husband to her before the marriage, without the interposition of trustees. *Ward v. Shallet.* 254
11. A deed may be evidence of an act of bankruptcy, though made in favour of creditors. *Clavey v. Hunt.* 255
- Distinction between powers and absolute interests. A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. As to these assets, however, as between the creditors, it was held, that a creditor by judgment, entered into for securing a portion given by the debtor on the marriage of his daughter, was

- entitled unto a preference. — *Lord Townshend v. Windham.* Page 243
12. Mere power unexecuted in a tenant for life who becomes bankrupt, does not vest in his assignees. *ibid.*
A wife not entitled to paraphernalia, where her husband died indebted. *ibid.*
13. See PARTNERSHIP, and *Pearce v. Chamberlain.* 264
14. Under a devise that all testator's debts "should be first paid and satisfied." Held that a customary estate surrendered in trust for several persons, and for the use of such as the testator should appoint, was subject to the testator's debts; the first disposition running over all. *Earl Godolphin v. Penneck.* 341
15. Wills construed to charge real estate by implication for the benefit or creditors. Such implication, however, may be afterwards destroyed. — *Thomas v. Britnell.* 352
16. Real assets followed under administration bonds by legatees. Creditors have no such right. *Ashby v. Bailie.* 362

CURACY, PERPETUAL.

Directions of the Court on establishing a right to hold a perpetual curacy, and as to the nomination thereto by the patron.

The question whether a perpetual curacy or no may be judged of by these concurring circumstances.

First, whether there are parochial rights belonging to the

chapel in question; secondly, with reference to the rights of the inhabitants within the district; and thirdly, as to the rights and dues belonging to the curate. Such a curate not removable at pleasure.

Presentation to a church or nomination to a perpetual curacy, may be by parol.

A bill is the proper mode of establishing a right to a perpetual curacy, &c. &c. and not on information in the name of the Attorney General, except in the case of charities. Augmentations of vicarages, &c. form such an exception. *Costa. Attorney General v. Brereton.*

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COURTS, FOREIGN.

As to the jurisdiction of Foreign Courts.

A commission granted to examine at Paris, as to the extent of jurisdiction of a particular Court erected there; but not as to the original constitution of it. *Gage v. Lady Stafford.* 403

CUSTOM OF LONDON.

Personal presents no advancement so as to bar the customary share, or share under the Statute of Distribution (1 Ves. 17.) Nor is maintenance, in the case of parent and child, even (as it seems) after marriage. *Elliot v. Collier.*

17

Orphanage Part.

A freeman, on the same day with his will, by deed assigns part of his personal estate in trust to separate use of his

daughter. He was then aged seventy-two; in the gout; and died in two days: the daughter had been married without consent; but he was reconciled. Held to be a testamentary disposition, in fraud of the custom, and that it might be disputed by the daughter's husband. Gift of personalty by freeman may be in life-time, or in *extremis*, if he divests himself of the property, and it is enjoyed accordingly; and if clearly not a testamentary act in fraud of the custom. *Tomkyns v Ladbroke*. Page 421

D.

DEBTOR AND CREDITOR.

1. A testator, reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real and personal estate; and bequeaths an annuity to A. for life, out of his real and personal estate.

Such creditor may enjoy the annuity, and be at liberty to dispute the testator's calculation of the debt. *Clark v. Guise*. 425

2. A debtor bequeaths a much larger legacy than the debt, upon a condition which, by a subsequent deed, it becomes impossible to perform. Held, it would not have been a satisfaction merely by the will, being for another purpose; but that the deed having freed it from the condition, there was a satisfaction. *Mathews v. Mathews*. 433

D

3. Though it is a general rule that a legacy larger than a debt, or equal to it, is to be considered as a constructive satisfaction; minute circumstances will take a case out of such rule. Page 433

DEBTS.

What is requisite to make a valid assignment of debts. *Ryall v. Rowles*. 166

DEGREE.

1. Decree on equity reserved, after verdict on issues at law, finding a will and other instruments to have been forged. *Barnesly v. Powel*. 74, 75, and (143)

2. Enrollment of Decree vacated, having been done too expeditiously. *Wright v. Wright*. 158
3. As to the process on a decree for possession of land. 194

DEEDS.

1. Grant of personal estate, by deed, to trustees, for a niece after the death of the grantor, passes to her representatives, although the niece died in the grantor's life-time. *Peck v. Parrot*. 128
2. As to neglect of a mortgagee in obtaining the title deeds. *Ryall v. Rowles*. 166
3. Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds until the offer be effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises. *Leech v. Trollop*. 436

DEEDS (VOLUNTARY.)

4. A deed executed on the same day as a will, held to be a testamentary act; and void against creditors. *Peacock v. Monk.* Page 80
5. Voluntary provision in trust for natural children, good against the father's representative. The estate, having been sold by him for a valuable consideration, the Plaintiffs were decreed to have satisfaction out of his assets, as there were words in the deed amounting to a covenant. An account being directed, a deduction was made in respect of their maintenance. *Williamson v. Codrington.* 215
6. Voluntary deeds good against representatives, if they amount to a complete conveyance or transfer. *Attorney General v. Whorwood.* 236

DEFENDANT.

A party may resist a demand, or rebut an equity, as a Defendant, by parol evidence, which would not have been admitted to be read in his favour, had he been a Plaintiff. 3 and 4

DELIVERY.

In the case of *donationes mortis causa*, an actual delivery is indispensable to vest the property, if the subject matter is capable of delivery. If it be so, there must be a delivery of what is equivalent to it at law. In the case of stock, &c. delivery of the receipts, &c. not sufficient to constitute such a gift, though strong evidence of the intent. *Ward v. Turner.* 378

DEMURRER.

See also PLEADING and PRACTICE.

1. General demurrer overruled, being unsupported by answer or plea to a specific charge in the bill. *Stroud v. Deacon.* Page 33
2. Demurrer allowed to a bill for payment of wages of knights of a shire; the remedy being at law. *Shepherd v. Cotton.* 33
3. Demurrer on the ground of forfeiture, and others, as to account of corn ground at other mills than the Plaintiff's, and to a decree that all Defendant's corn should be ground at his mill. *Lord Uxbridge v. Staveland [Stat-ham.]* 44
4. In order to bind "assigns," or "heirs" under the covenant, the bill must state them to be so bound, or it will be demurrable. 45
5. A demurrer, if good to the relief, will extend to the discovery also; though a Defendant may waive such advantage if he please. 111
- A demurrer is either allowed, or overruled in toto. 112
6. Demurrer to information as subjecting Defendant to pains and penalties. A demurrer may be put in after a plea is overruled. *East India Company v. Campbell.* 131
7. Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent, would cause a forfeiture of an estate; the bill charging there was such marriage, and no consent. *Chancey v. Fenhoulet.* 338
8. Quere, whether a demurrer

will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter, on account of Plaintiff not having obtained leave of the Court, and made the usual deposit. *Cole v. Gibson*. Page 211

Et vide Mr. Beames' Orders in Chancery, 1, and the notes, and 368, *ibid*.

DEPOSITIONS.

1. Where it is quite clear that an examination in chief is morally impossible, there may be a publication of depositions taken *de bene esse*. *Gason v. Wordsworth*. 353, 357
2. Depositions *de bene esse*, published saving just exceptions, the witnesses being dead before an opportunity to have examined them in chief, though there was delay on both sides. *Anonymous*. 394

DESCRIPTIO PERSONÆ.

Question as to whether a bastard could take under the denomination in a will of "eldest son," by way *descriptionis personæ*, the testatrix knowing of his existence, and believing that there was no lawful issue. *Baker v. Baker*. 319

DEVISE.

1. Devise of all the remainder of testator's goods and "real estates," will pass the inheritance, and all his interest in lands, including reversions. *Ridout v. Paine*. 13
2. Devise to A. in fee, with directions to settle on descendants of his mother for their

several lives, &c. A. may limit an inheritance to effectuate the general intent. *Godolphin v. Godolphin*. Page 22

3. Devise to A. for life, with power to trustees to settle a jointure on his wife; and subject thereto, in strict settlement on the issue of such marriage; but if A. should die without any issue of his body, then over. The latter words gave an estate tail by implication. *Allanson v. Clitherow*. 24
4. The Court will not appoint a receiver on bill by an heir at law against a devisee, unless there are strong circumstances. *Knight v. Duplessis*. 157
5. Lands agreed to be purchased pass by general words in a will, such as "or elsewhere." *Potter v. Potter*. 191
6. Devise, Execution and Attestation of.—Not necessary under the Statute of Frauds that a testator should sign in the presence of witnesses. His acknowledgment of his hand-writing is sufficient, although done to the several witnesses at different times. Where a will is to be established in Equity, it must be proved by each of the subscribing witnesses if living, and if dead, their deaths must be substantiated, &c. One of the witnesses being beyond sea, there should have been a commission to examine him; and the court could only direct a Trial at Law. Attestation of markamen good under the Statute of Frauds. *Grayson v. Atkinson*. 383

DEVISE (EXECUTORY.)

7. An estate being devised to R. "or his heirs," on a contingency, and R. having conveyed all his right, title, &c. before the contingency happened, and then died, his heir has no claim. *Wright v. Wright.* Page 181

aunt takes under the statute equally with nephews and nieces. In such case they take *per capita*, and *not per stirpes*. *Lloyd v. Tench.*

Page 326

6. Bequest to "near relations," means those within the Statute of Distribution. *Whithorn v. Harris.* 401

DISTRIBUTIONS (STATUTE OF.)

1. Posthumous brother of the half blood, entitled under the statute. *Burnet v. Mann.* 85

2. Under a bequest of residue to trustees, to pay the interest to the widow for life, and after her death to divide the residue among such of testator's relations as would have been entitled under the statute, if he had died intestate, held that the widow's representatives were excluded. *Davies v. Baily.* 62

3. Bequest "to such of nearest relations" as A. should think poor and objects of charity," confined to those within the Statute of Distributions, under A.'s advice. *Goodinge v. Goodinge.* 122

4. English subject resident and dying in England, where his will was proved, but having debts and choses in action in Scotland, held, that the latter were distributable as the rest of his effects. Debts follow the person of the creditor, not of the debtor. As to debts due to a freeman of London. *Thorne v. Watkins.* 265

5. Where no issue, nor brother or sister of an intestate, an

DOWER (FREEBENCH, &c.)

1. What shall be a bar of, &c. 43, 44

Wife barred of Freebench by settlement under agreement before marriage to accept it in lieu of dower, or thirds. *Walker v. Walker.* 43

2. Devise of residue of personal estate to a wife, no bar of dower by implication. *Syres v. Willis.* 122
3. The Court, in taking general accounts, making an allowance to a widow for arrears of dower, will not put her to a fresh suit for future profits, but will decree them to be paid. *Graham v. Graham.* 134

E.

ECCLESIASTICAL COURT.

As to commissions of review from the delegates of, See 27

EJECTMENT.

After leave given by the Court to bring an Ejectment, a new Ejectment cannot be brought without leave. *Sands v. Sands.* 205

ELECTION.

1. Heir put to his election as

to an unsurrendered copyhold. *Allen v. Poulton*.

Page 76

2. *Aliter* as to real estates at the common law, where will is incompetent to pass them, as from defect of its execution, &c. &c.

77, 78

3. A person taking a benefit in real or personal estate, under a will, must abide by it in toto. Therefore an unsurrendered copyhold was decreed to pass. *Cookes v. Hellier*.

127

See *Kirkham v. Smith*. 133

4. Marriage settlement rectified by a strict settlement agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage. The Plaintiff, however, having taken a benefit under the will, which he disputed, held to have made his Election, and decreed to give up part of the settled estate in satisfaction. *Roberts v. Kingsley*.

129

5. Deed-poll not delivered, but operating at the death of grantor, and a bond given in favour of a natural daughter. She was put to her election. *Johnson v. Smith*.

154

6. Will purporting to give a real estate to A. but not executed agreeably to the statute, giving (*inter alia*) a contingent legacy to an infant (who became the testator's heir at law,) and expressly directing that if any who receive benefit from the will, should dispute it, they should forfeit all claim under it. The infant heir decreed to elect when he came of age; and the intend-

ed devisee allowed to be in possession in the meanwhile, subject to account, &c. Query, as to the latter. *Boughton v. Boughton*. Page 248

7. See *Jenkins v. Jenkins*.

250

8. Legacy in lieu of things expressed, shall not put the party to his Election as to another benefit; though it may be contrary to an intent that he should take both. *East v. Cook*.

263

9. Election to be made by a Feme Covert resident abroad, cannot be effectuated under a Power of Attorney, &c. from the husband and wife, or any thing short of a commission, or as near thereto as possible. *Parsons v. Dunne*.

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ENROLLMENT.

Enrollment of Decree vacated, having been done too expeditiously. *Wright v. Wright*

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ENTAIL.

See ESTATE-TAIL.

EQUITY.

See also JURISDICTION.

1. A demand may be resisted, or an Equity rebutted, by parol evidence, which could not be the foundation of a substantive claim by a Plaintiff. 3 and 4
2. As to the Court's interference by way of specific performance of covenants to rebuild. *City of London v. Nash*. 14, 15
3. Money to be laid out in land, considered in Equity as land. *Sperling v. Toll*. 52
4. The Courts will not relieve

against a Master's legal right to the earning of his apprentice. *Hill v. Allen*.

Page 62

5. An attorney not disclosing an incumbrance to the buyer of an estate, and leaving him to suppose the title would be a good one, held liable to take satisfaction in default of the vendor. *Arnott v. Biscoe* 67
 6. After a verdict on issues at law establishing the fact of a will and other instruments having been forged, the party was (*inter alia*) restrained from use of, or insisting on a Decree made by the Court of Exchequer; and ordered to consent to a reversal of a sentence in the spiritual Court. *Barnesly v. Powel*. 74, 75, and (143)
 7. Equity will relieve against bargains made under a misconception of rights; and more especially where the other party seems better apprized. In such a case the Court decreed the repayment a specific sum of money, with interest and costs.—*Bringham v. Bringham*. 97
 8. Money to be laid out in land, considered as land, to effectuate a testator's general purpose. *Johnson v. Arnold*. 96
 9. Bill lies for payment of an entire rent out of a manor, against the owner of such manor, without resorting to the several occupiers, where there are no demesne lands on which to distrain. *Duke of Leeds v. Powell*. 98
- ef in Equity where
- an action of law would not lie by reason of a substantial defect; such as a contingency not happening. *Whitmel v. Farrel*. Page 133
11. No relief in Equity on a lost[legal] instrument without an affidavit of the loss, and offer of indemnity. As to an action on a note payable to A. or bearer. And as to the modern practice of actions at law, and the ancient and established Jurisdiction of Courts of Equity on lost bonds. *Watmsley v. Child*. 163
- See also *Whitefield v. Fanocet* 169, 170, also 378, 379.
12. Relief against agreement under a misconception of rights. Agreement as to distribution of personal estate set aside, although ratified; the value appearing much greater than was known to the Plaintiff at the time.—*Cocking v. Pratt*. 176
 13. Relief on bond misdrawn by mistake; and a just demand out of assets will be satisfied in Equity though there be no remedy at Law from the nature of the instrument, &c. *Bishop v. Church*. 288 and 363
 14. No jurisdiction in the Court to deal with any property given over in default of issue upon any probability whatever of there being no issue. Bills in Parliament on such grounds often refused. *Anonymous*. 291
 15. Factor or correspondent pretending to insure as directed, charged as if he had insured. But such equity does not extend to an agent

employed by him [ignorant of such deception.] *Tickel v. Short.* Page 331

16. Query, whether a trustee or his heir can claim admittance to copyholds, or hold for their own benefit where the *cestuy qu'a* trust has died without heirs?

It is a question whether trust estates in copyholds escheat to the lord in such a case? If they do, and the trustee has been admitted, it seems he would be considered as holding for the benefit of the lord, and decreed to surrender. If they do not escheat, the question is, who is entitled to the beneficial interest?

348, 349

It has been said a Court of Equity would decree such an estate to be sold for the benefit of the next of kin, but that seems very doubtful. 349

Query, therefore, whether in such a case the Lord could refuse the trustee admittance, and if compellable by Law to admit him, he would not be entitled to the assistance of a Court of Equity. *ibid.*

17. Thirty shares in a privateer remaining unsubscribed for, and taken by the managers of the concern on their own account, after a valuable capture, held to be the exclusive property of the managers. Bill on behalf of the other subscribers dismissed; since if there had been a loss, they could only have been answerable to the amount of their own shares.

Not dismissed with costs, as this act of the managers might

give occasion to litigate the matter.

In all mercantile contracts and adventures, parol evidence of usage in such cases allowed.

Parol evidence, in the above case, as to usage and custom on behalf of the Plaintiffs, but not being read by them at the hearing, allowed to be called for and used by the Defendants. *Blunt v. Cumyns.*

Page 353

18. Fine by persons in possession and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *E. Pomfret v. Lord Windsor.* 389

19. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury under the general jurisdiction in bankruptcy. It is otherwise where they apply to a Court of Equity by a bill to be relieved. *Ex parte Skip.*

392

20. Bill *qua timet*, A. having disposed of part of a specific sum, which he had covenanted should be paid to B. on a contingency, decree to secure it. *Flight v. Cook* 426

ESCHEAT.

It is not absolutely determined whether trust estates, or equities of redemption in copyholds escheat to the lord.

Vide 348, 9

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ESTATE.

1. Devise of all the remainder of testator's goods and "real estates" will pass the inheritance and all his interest in lands, including reversions. *Ridout v. Paine.* 13
2. A devise of a testator's "estate at A." without more, will comprehend his whole interest in the lands rather than be referable to the mere locality.

If, however, words of limitation be added, they will determine the extent of the benefit. *Southby v. Stonehouse.*

424

ESTATE FOR LIFE.

Question as to whether an estate for life or in tail. *Bagshaw v. Spencer.* Page 82

ESTATES *pur auter vie.*

1. As to whether these should be considered as real or as personal estate. See in *Allanson v. Clitherow.* 24
2. Lease for three lives to A. her executors, &c. A. assigns all right to the use of B. for life, and afterwards to his issue; and for want of such issue, to the use of A. her executors, &c. The whole vests in the issue of B. and issue means children; and A's executor, who was a special occupant, cannot claim against it. *Williams v. Jekyl.* 440

ESTATE-TAIL.

1. Devise to A. for life, with power to trustees to settle a jointure on his wife; and subject thereto, in strict settlement on the issue of such marriage: but if A. should die without any issue of his body, then over. The latter words gave an estate tail by implication. See *Allanson v. Clitherow.* 24
3. Money not allowed to be entailed. *Butterfield v. Butterfield.* 81
2. Furniture and household goods bequeathed for the use of those who should enjoy an estate, to be taken care of and delivered by executors, and to remain as if in testator's own possession, held to vest in the first taker. *Wyth v. Blackman* 110

4. Personal estate incapable of entail. Page 322
5. Devise of real and personal estate in trust for A. for life; and afterwards for the heirs of his body; afterwards for the other sons of A. successively in tail, taking testator's name; then to the daughters in tail; for want of such issue to convey to C. in fee. B. is entitled to a conveyance in tail of the real and of the absolute property of the personal. The intent being at least doubtful, the legal operation of the words cannot be taken away; and as to the personal, it vested absolute by such limitation, whether so intended or not. *Garth v. Baldwin.* 434
6. Devise to H. for life, and no longer, taking the name of R. and to such son as he should have taking the name; and in default of such issue, remainder over. Held an estate to H. in tail male. *Robinson v. Robinson.* 328
8. Question as to whether an estate for life, or in tail. *Bagshaw v. Robinson.* 82
8. Trust of a chattel real, for S. for life, and immediately after her death for the "heirs of her body," with limitations over. The whole interest vested in S. As to where the words "heirs of her body" have been held words of purchase in the same sense as "issue."—*Theebridge v. Kilburn.* 331
9. Questions as to equitable estates in tail. *Brownsword v. Edwards.* 334
10. Sir Thomas Sewell decided that under a limitation by marriage articles for the first son, and the first son of such first son, the former could not be restricted to a life estate, or take less than an estate tail; but the law seems contra now. *Hucks v. Hucks.* Page 417
11. Feme Covert by will pursuant to power leaves to her husband "all the profits and revenues of my estate of A. and B. for life, and after his death, my said estates to my children, if I should leave any to survive me; but if I should leave no such child or children, nor the issue of such, the said estates to I. H.; making him sole heir in default of issue, and after the death of my husband." The children take an estate tail; not fee simple; and the remainder to I. H. is good; not a contingent executory limitation on her dying without children living at her death, but a general dying without issue. *Southby v. Stonehouse.* 424

EVIDENCE.

1. No Decree in Equity on the testimony only of one witness against a positive denial by answer uninfluenced by other circumstances. 51
2. Accounts, memoranda, &c. of a deceased party, read in evidence in exoneration of his assets, as against another Defendant who was charged as equally liable to the Plaintiff's demand. *Hill v. Ballard.* 55, 56
3. One witness held sufficient to

prove a testator's intention in favour of his brother, to rebut a constructive trust.

Maddison v. Andrew.

Page 45, 46

4. The objection as to the examination of Counsel, Attornies, Solicitors, &c. as witnesses, is not on the ground of any personal privilege in them, but for the sake of the client, or party concerned. Courts, therefore, both of Law and Equity, will stop such disclosure, or suppress such depositions if made to the party's prejudice. 48

5. Answer of an heir at law believing that a will was made will not prevent the necessity of proving it. *Potter v. Potter.* 139

6. Draft of a deed, traced into possession of a Defendant's family, very good evidence. *Whitefield v. Fawcett.* 169

7. Disusage, evidence of abandonment by consent as to part of a constitution relative to a charity, which arose from consent. *Attorney General v. Scott.* 182, 183

8. A husband receiving the proceeds of a sale of wife's estate, and promising by a note or receipt to lay it out pursuant to trusts relative to other property, this note held evidence of the agreement antecedent to the sale; and estates purchased afterwards by the husband, were held to be bound. *Attorney General v. Whorwood.* 236

9. A deed may be evidence of an act of bankruptcy, though made in favour of creditors.

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10. Bill by executors on loss of notes mentioned in a list written by the testator. Such a list not of itself evidence of the property, but left to be tried at law. As to the evidence of proceeding in equity or at law on lost instruments, want of profert of bonds, &c.

No Decree for a plaintiff in equity on the evidence only of one witness in contradiction to Defendant's positive answer. The testimony of a witness read if he was indifferent when examined, though becoming interested afterwards. *Glynn v. Bank of England.* 266

11. A person's own entry in books of account allowed on inquiries before the Master, as evidence of a claim made in his lifetime; but not as original, or positive evidence of the fact.

Entry by servant or agent, usually employed in such matters, allowed as good evidence, upon proof of his death. *Lofebure v. Worden.* 270

12. On loss of a deed, &c. the same rule of evidence here as at Law. Loss of deed can only be made out by circumstances. The destruction of a deed, &c. by affidavit. Decree in a former cause between the same parties, read as evidence, though not conclusive. So also of depositions in a cause which had settled the rights of all; as under a Decree for performance, of trusts. *Askew v. The Poulterers' Company.* 284

13. The same rule of evidence

- at Law and in Equity as to the loss of a deed. On liberty given to bring an action, unnecessary to order that the depositions shall be read at Law. *Clavering v. Clavering*. Page 329
14. Depositions of one Defendant not read in favour of another, where the former is at all concerned in interest, or a Decree can be made against him. Such objection is wholly as to his incompetency. Though a Plaintiff at law is not allowed to examine any Defendant as a witness, one Defendant may there examine a Co-defendant. In Equity, a Plaintiff may examine a Defendant; and a Defendant a Co-defendant, but then it is on a suggestion that the party is not interested, and saving all just exceptions from the nature of the suit, &c. or in case of there being any material evidence against him, &c. &c. *Dixon v. Parker*. 327
15. In proving exhibits *viva voce*, the rule is invariable that the party can only examine the witness to the hand-writings. Nothing therefore can be used as an exhibit, proved *viva voce*, in respect of which the other party would have a right to cross-examine. It seems, however, that the benefit of such instruments, on the one side, and the right to controvert on the other, is a proper subject of adjustment either in the Master's office, under a commission by virtue of his certificate; or under a trial at law. *E. Pomfret v. Lord Windsor*. Page 389
16. Parties resting their defence in an issue at law upon instruments ascertained at the trial to be forged, will not be allowed to enter into any other evidence, or to say the forged instruments were immaterial. *Kemp v. Mackrell*. 419
- EVIDENCE (PAROL.)
- See AGREEMENT, RESIDUE, NEXT OF KIN, &c.
17. Parol Evidence admitted in favour of a Defendant to resist a demand, or rebut an equity where it could not be the foundation of a demand in a plaintiff. 3, 4
18. See *Robinson v. Gee*, 131, 132
19. As to admission of Parol Evidence where fraud or surprise. *Baker v. Paine*. 199
20. *Vide in Bishop of Cloyne v. Young*. 285
21. Parol Evidence admitted to explain a will, where doubtful: not to contradict. *Hampshire v. Pearce*. 327
22. Bill for specific performance of a written agreement, and parol evidence read of a variation from it; which being proved, the bill dismissed with costs; the plaintiff not being allowed to resort to the substantial agreement thus proved on the part of the Defendant. Parol Evidence admitted to resist a claim, or rebut an equity, though inadmissible to establish a demand. *Legal v. Miller*. 347
23. Parol evidence as to the

custom and usage of merchants admitted in all mercantile contracts and adventures.—Parol Evidence, which had been taken on behalf of the Plaintiffs, but not used by them, allowed to be called for, and read on behalf of the Defendants. *Blunt v. Cumyns*. Page 353

24. Parol Evidence admitted to show, that though a bond, on marriage, was for 150*l.* per annum, yet the agreement was for 100*l.* The bill dismissed, as founded on a private agreement, calculated to deceive a material party. It was dismissed, however, without costs. *Pitcairne v. Ogbourne*. 364

EXCEPTIONS.

See also PLEADING, ANSWER, &c.

1. Confirmation of Master's Report opened, and the Report allowed to be excepted to, or reviewed under particular circumstances, although previous exceptions had been disallowed after argument. *Hawkins v. Day*. 106
2. Exceptions to a certificate from commissioners of Bankrupt. *Vide* "Bankrupt," and *Ex parte Baz*. 366
3. Lord Hardwicke held that in case of a bill for discovery of a Defendant's title, he might object to make such discovery by his answer as well as by plea, &c. *Buden v. Dore*. 379
4. A Defendant who did not except to the first report of insufficiency of an answer, held not absolutely excluded from insisting on the same matter in his second answer.

Though a Defendant is not bound to answer what may subject him to ecclesiastical penalties; or whether he is or not married to a woman he cohabits with; or whether he is an alien, &c.; he must, in a proper case, answer whether he hath, or not, a legitimate son. *Finch v. Finch*.

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5. There is a difference in consideration of law and the strict rules of the Court as to the case of a lunatic being let in to take exceptions to a Master's Report after its being confirmed, and that of an infant, but it is equally open to the discretion of the Court in either case. *E. of Bath v. E. of Bradford*.

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EXECUTORS.

1. Discretionary power given to Executors is not determined by the death of one of them. *Flanders v. Clark*. 12
2. An Executor is bound to set apart a fund to answer future demands under a clear contract. *Johnson v. Mills*. 143
3. Residue undisposed of, held vested in Executors beneficially, and no resulting trust for the next of kin, although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal. *Blinkhorne v. Feast*. 262
4. Though the Court is not strict in holding executors, who have acted fairly, to an admission of assets; yet in

this case; circumstances tending to show that the Defendant had admitted assets several years before, and he having obtained a release, which the court held to be fraudulent, a personal Decree was made against him for the legacy and interest, with costs. *Horsely v. Chaloner.*

Page 280

5. Testator manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee, it was held that the executors were not entitled to the surplus. Where parol evidence can be read to show no resulting trust, like evidence may be read contra to disprove the implication from the former. Legacy to one alone of two (or more) executors, will not exclude either.

6. Legacy to the daughter, &c. of an executor, is not to be deemed a legacy to him so as to prevent his taking the surplus merely for that reason. *Bishop of Cloyne v. Young.*

235

7. Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. Legacy does exclude executors in general; though not universally. *Andrew v. Clark.*

314

8. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his lifetime, the Defendant held entitled to the whole residue,

comprising those articles as lapsed; and the bill of the next of kin was dismissed; but without costs. *Wilson v. Ivat.*

Page 317

9. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personalty.

Sir J. Strange, M. R. held that executor, as such, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shown; calling him a "legal residuary legatee."

Wilson v. Ivat. 317

10. Distinction between the executor, as such, taking lapsed residue and a lapsed legacy. Held that he does not take the former. As to the latter, query.

318

11. Executor not having exhibited an inventory, and having paid all legacies but one, is a sufficient foundation to charge him with assets as to that legacy, though not positively conclusive.

An inventory solemnly exhibited not conclusive on executor, if there has been a variation of circumstances. A legatee paid by an executor voluntarily, not obliged to refund to the rest; except in the case of his insolvency.

Orr v. Kaines. 324

12. Each executor has entire control over a testator's personal estate; he may release, pay, or transfer without the others. And so as to each administrator; though formerly questioned.

One executor may retain in

satisfaction of his own debt, if no fraud.

A surviving partner, therefore, being an executor of the deceased partner, and having mortgaged leasehold property of the latter for better security of a debt due from the testator to himself, the mortgagees were entitled to satisfaction; and creditors of the testator, under marriage articles, who had no specific lien, were not allowed to pursue the premises thus assigned. *Jacomb v. Harwood*.

Page 338

13. Executors can make a valid assignment of their testator's property in respect of their own debts, or where they apply the consideration of it for their own purposes, if no fraud in the other party, or reasonable ground of suspicion in the transaction. *Taner v. Ivie*. 386

14. Executors and administrators are considered as trustees in many instances. 390

15. Bequest of residue to go over in a particular event (which took place) to . . . (leaving a blank.)

The executors excluded by such inchoate gift, and the next of kin entitled.

Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guilford v. Purdon*. 394

16. Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or administrator; and though

such trustee, who receives the trust money, and thereby becomes a debtor, is not to be considered, and chargeable as executor, merely because he is so named in a will, yet where he is made a co-executor, and does not renounce whilst he receives the trust-money, he is properly made a Defendant to a suit for a general account, and is accountable therein for his receipts; and this the more especially since his being named executor is a release of the debt at law. *Moore v. Moore*.

Page 422, 423

EXECUTORY DEVISE.

Contingent remainder on an executory devise. *Hopkins v. Hopkins*. 137

EXPECTANCIES.

See POST OBIT BONDS.

Purchase of a reversion not set aside merely for undervalue, there being no fraud.

Nichols v. Gould. 374

EXONERATION.

1. Incumbrances of an ancestor not a primary charge on the son's personal estate, although the latter had entered into a covenant to pay them. *Leman v. Newnham*. 40
2. Settlement on marriage, of estates leasehold and others, which were subject to incumbrances. The issue of the marriage held not entitled to have them disencumbered out of their father's assets. *Clarke v. Samson*. 69
3. Second tenant in tail joins in a mortgage and bond with the

first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible.

Robinson v. Gee. Page 131

4. Tenant in tail pays off an incumbrance, but takes no assignment; the remainder over; under the circumstances subject to pay it to his representative. *Kirkham v. Smith.* Page 133

5. Exoneration of personal estate by real estate must be by express declaration or necessary inference. 202

6. A father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received and applied to his own use. Decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. *Piers v Piers.* 220

7. Money due by testatrix at her death in respect of suits instituted by her relative to her real estates, held to be a charge upon her real estate; and that the personal estate was wholly exempt. *Mogg v. Hodges.* 269

On forfeiture of an estate, the crown or its grantee takes it *cum onere*; that is, subject to all charges fairly binding the party with reference to it, although voluntary; but not subject to debts at large. The crown in such case has the same Equity to be relieved

against conveyances on the ground of fraud, &c. &c. as the party would have. *Duke of Bedford v. Coke.*

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F.

FACTOR.

Plaintiff a factor abroad, having exceeded the price limited for a purchase of hemp; the Defendant, who objected to the contract, but afterwards re-shipped and disposed of some of it on a new risk, was ordered to account for the whole at the cost price. *Cornwall v. Wilson.* 214

FEE.

See also ESTATE OF INHERITANCE, &c.

It is not necessary that the word "heirs" should be inserted to carry the fee, where the purposes of a trust cannot be answered unless the trustees have a fee. *Gibson v. Lord Montfort.* 203

FEE (CONDITIONAL.)

Annuity in fee granted by king Charles II. out of Barbadoes duties, is not a rent nor realty; nor within the Statutes either of Frauds or De Donis, &c. Therefore being settled on A. "and the heirs of her body," it was held to amount to a fee simple conditional at the common law, the remainder over being void, and that A. having had issue, might bar the possibility of reverter. *Earl of Stafford v. Buckley.*

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FEE (SIMPLE.)

Devise of all that "estate" testator brought of M. held to pass the fee. So held also as to another clause which was a devise of "the reversion" of that tenement his sister lived in after her death. Held contra as to other devises, being first, "all those houses he bought of T. W. containing three dwellings, with all their appurtenances," and next as to a devise of "that tenement in the possession of M. B. presently after his death." *Bailis v. Gale*. Page 268

FEOFFMENT.

A deed poll by a father, in favour of his family, purporting to grant real and personal estate, to take effect after his decease, and without any livery made, held to amount to a covenant to stand seized. *Rigden v. Vallier*. 335

FINE.

1. As to a fine of land not barring a rent charge issuing out of the land, and belonging to a third person. 170
2. Fine by persons in possession, and non-claim, the legal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *Earl of Pomfret v. Lord Windsor*. 339

FORFEITURE.

1. Gift over on A's. refusal to marry B. The forfeiture held not to take place from an offer being declined once or twice, but from a more for-

mal acknowledgment. *Johnson v. Smith*. Page 154-5

2. On forfeiture of an estate, the crown or its grantee takes it *cum onere*; that is, subject to all charges fairly binding the party with reference to it, although voluntary; but not subject to debts at large. The crown in such case has the same Equity to be relieved against conveyances on the ground of fraud, &c. &c. as the party would have. *Duke of Bedford v. Coke*. 293
3. The legal disability of an alien to hold lands, neither a penalty or forfeiture. *Attorney General v. Duplessis*. 346
4. Demurrer allowed to a discovery of the fact of a marriage, which, if taken place without consent, would cause a forfeiture of an estate; the bill charging there was such marriage and no consent. *Chancey v. Fenhoulet*. 338

FORGERY.

1. Issues directed as to the forgery of a will and other instruments, and decree on the result on the equity reserved. *Barnesly v. Powell*. 74, and (143)
2. A will relative (*inter alia*) to real estate having been found by a verdict at law to have been forged, the Defendant ordered to transmit and lodge the probate, &c. with the Registrar of the Ecclesiastical Court, &c. &c. *Barnesly v. Powel*. 143, 149, &c.

FRAUD.

1. As to securities, &c. in fraud of marriage agreements.

Page 57, 64

Settled estate disencumbered of a charge in fraud of a marriage agreement. *Troughton v. Troughton.* 64

2. A party having obtained a sum of money from the Plaintiff in purchase of an estate to which the Defendant had laid claim, but of which he seemed to be apprized the Plaintiff was the true owner, decreed to refund that specific sum, with interest and costs.

Bingham v. Bingham. 79

3. As to suspicious assignments for the family of an insolvent solvent debtor. *Jenner v. Wilkins.* 109

4. A promissory note, suspicious in itself under the circumstances, and the admitted object of it being an improper one, even if the note were actually genuine; decreed, at the instance of the person alleged to have given it, to be deposited with the Registrar of the Court in the first instance; with a declaration that the Plaintiff was entitled to be relieved against it; without preventing the Defendant from bringing an action on it within a reasonable time; and if delay in so doing, then to be delivered up. *Bishop of Winchester v. Fournier.*

380

5. Assignment of a sailor's share of prize money at an under-value, set aside for fraud; but still to stand as a security for what was really advanced. The same equity as to an un-

der assignment. *How v. Weldon.* Page 396

6. Gift of an annuity soon after coming of age to trustee, or guardian, set aside on general principles of public utility; and here, furthermore, on particular circumstances of imposition. A person, however, may bind himself, soon after coming of age under proper circumstances, as if, being actually in possession, and *quite sui juris*, he makes such a grant by way of reward. *Hylton v. Hylton.*

405

7. Relief against deeds obtained by fraud and imposition.

Conveyance for consideration not afterwards to be set up as a gift; and being for fictitious consideration, inserted by the grantee himself, though found a gift by a jury, set aside in equity.

Interest obtained through fraud cannot be maintained by third persons, though not themselves parties to the imposition. *Bridgman v. Green.* 429

FRAUDS (STATUTE OF.)

See EVIDENCE PAROL.

1. A mother suffering a marriage to take place upon an understanding that she would give her daughter £1000 portion; and articles having been executed amongst the other parties, whereby such portion was agreed to be settled. Held that her signature to the articles, as a witness, she knowing the contents, was equivalent to her being an actual party to them, so that

she could not take advantage of the statute. *Wilford v. Bezely*. Page 6

2. With reference to the statute, the word "party" is not to be considered as party to a deed, but as person in general. 6
3. The Statute of Frauds does not enable a party to commit a Fraud; as in the case, where a mere mortgage being contemplated, and an absolute conveyance made by one deed with the intention of a defeazance being executed by another, which never takes place, &c. &c. *Dixon v. Parker*. 327

4. Bond by husband on marriage, reciting agreement to settle wife's estate on the issue, &c.; the wife not an executing party. After the marriage a real estate of the wife came into possession. The husband died. The wife married B. and died; bill by a younger child against B. and the heir of his mother. It seems that the Statute of Frauds could not have been taken advantage of, on account of the wife not having been an executing party, since the marriage took place, in consequence of the instrument executed by the husband. Here, however, the wife had proved and acted under her first husband's will which recited the bond; from whence it was held that she had bound herself at all events. *Archer v. Pope*. 400

G.

GRANT EX TURPI CAUSA.

Bill for payment of a sum of

money and an annuity secured by a deed poll by a young woman who had been seduced by a married man, in whose family she lived as companion to his wife, and who, by continuing to live with him, occasioned a separation, dismissed; but without costs, on account of her previous good character. *Priest v. Parrot*. Page 313

GUARDIAN AND WARD.

See also **WARD OF COURT.**

1. As to the marriage of a Ward of Court to a Foreigner out of the Realm:—the protection and interference of the Court, even after a Female Ward has attained 21. Its removal of testamentary guardians, &c. see in *Roach v. Garvan*. 86, 87
2. It is waste in a Guardian to convert ancient pasture into arable land, even for a temporary benefit. *Clark v. Thorp*. 329
3. Guardian or trustee for an infant, who has a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit.—Though such an act may not amount to waste, he will still be enjoined. *Knight v. Duplessis*. 359

H.

HEIR.

1. Answer of an Heir at law believing that a will was made, will not dispense with its being proved against him. *Potter v. Potter*. 359
2. The Court will not appoint a receiver on bill by an heir at

law against a devisee, unless there are strong circumstances.
Knight v. Duplessis.

Page 157

3. An estate being devised to R. "or his heir," on a contingency, and R. having conveyed all his right, title, &c. before the contingency happened, and then died, his heir has no claim. *Wright v. Wright.* 181

4. Devisee on condition that the land should go over to another, if he did not give a release in three months after Testator's death, dying in the Testator's life-time, the devisee over shall take instead of the heir at law, this being a conditional limitation, and not a strict condition. *Avelyn v. Ward.* 183

5. Receiver not appointed on behalf of heir at law, as against a devisee. The heir must try the question at law. *Knight v. Duplessis.* 359

HEIR (EXPECTANT.)

Courts of Equity are more strict now than formerly as to bargains made for a person's expectancies. 297, 298; and *Evans v. Chesshire.* 300

HEIR-LOOMS.

Books not heir-looms; and if limited to go with entailed lands, they become the property of the first tenant in tail. *Bridgewater v. Egerton.*

296

HIGHWAY ACTS.

The Highway Acts protect garden-grounds used for trade as much as private gardens.—*Hughes v. Morden College.*

105

I.

IDIOT.

As to idiots in the strict sense of the word. Page 370

IMPERTINENCE.

See also SCANDAL.

1. Reference for scandal may be at any time; not so as to mere impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous.—Nothing scandalous that is strictly relevant to the merits. *Penhoulet v. Passavant.*

260

2. Any record of the Court may be referred for scandal at any time; [and even by strangers to the suit;] but it is otherwise as to a reference for impertinence. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. *Anonymous.* 431

INCUMBRANCES.

See also EXONERATION, MORTGAGE, PRIORITIES.

Tenant for life must keep down the interest of incumbrances, though the whole of the rents and profits are exhausted by it. The Court will, however, in some instances, direct a reasonable maintenance thereout, if the tenant for life be otherwise unprovided for. *Revel v. Watkinson.* 66

INFANT.

1. Questions as to infant tenants in tail, their personal representatives, &c. *Rook v. Worth.* 200

2. See ELECTION, and *Boughton v. Boughton*. 248
3. An infant's inheritance is never bound by acts of the Court. *Taylor v. Philips*. 258
4. The next friend of an infant allowed costs, though the bill had been dismissed; the Master having previously reported the suit for the infant's benefit. *Taner v. Ivie*. 386
Sed vide ibidem.
5. There is a difference in consideration of law, and the strict rules of the Court, as to the case of a lunatic being let in to take exceptions to a Master's report, after its being confirmed, and that of an infant, but it is equally open to the discretion of the Court in either case. *Earl of Bath v. Earl of Bedford*. 420
6. Where a trustee for an infant has money to lay out for his benefit, and employs it in his own trade, &c. The Court will exercise an option for the infant either to have interest or the profits made. *Anonymous*. 430

INFLUENCE (UNDUE.)

See FRAUD, MISREPRESENTATION, &c.

Stated accounts set aside, the items being very gross, and obtained from a person just come of age, under a misrepresentation, and the party [a solicitor] charged with interest on monies directed to be laid out for the infant's benefit, notwithstanding a deed from its grandmother,

that he should not be so chargeable. *Brown v. Fring*. 181

INHERITANCE.

See ESTATE, FHE, &c.

1. Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, &c. A. may limit an inheritance to effectuate the general intent. *Godolphin v. Godolphin*. Page 322
2. Rents and profits undisposed of, belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins*. 137-8
3. Whatever portion of an inheritance, or part of any term carved out of it is not expressly, or clearly given away, or disposed of, remains with the owner of the inheritance or his heir, and therefore a grant or devise of the "rents and profits" of such a term, without further words of limitation, will operate only for the purposes expressed, or to be clearly inferred. *Belt v. Mitchelson*. 227
Et vide Conyngham v. Conyngham. 221
4. The purchase of houses in London, and of lands of the tenure of borough English, held not to be a due execution of a covenant in marriage articles to purchase or settle "lands of inheritance." *Pinnel v. Hallet*. 344

INJUNCTION.

See also PRACTICE, WASTE, &c.

1. Garden grounds used for

- trade, & much protected under the Highway Acts, and by injunction in Equity, as private gardens. *Hughes v. Morden College*. Page 105
2. As to injunctions against creditors suing at law, after a Decree to account. *Martin v. Martin*. 114
 3. A jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder man in tail having acquiesced and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston*. 175
 4. Injunction against stopping lights until the trial of the right, which was directed on the motion. The Court will never on motion make an adverse order to pull down what has been done. *Ryder v. Bentham*. 242
 5. Injunction to stay building not granted in cases of mere injury or inconvenience to property or persons adjoining, or otherwise, except by agreement, or the building being of such a nature as to stop up ancient lights. *Morris v. Lessees of Lord Berkeley*. 383
 6. Where a question is one determinable at law, and no obstacle or inconvenience in trying it, a Court of Equity will not interpose by injunction. In this case an injunction to stay the use of a market was refused. A right cannot be established against all persons under a mere bill for an injunction. *Anonymous*. Page 371
 7. Injunction extended to stay trial in actions by a corporation for petty customs. *Anonymous*. 426
 8. What will be a breach of an injunction to stay proceedings at law. *Anonymous*. 431
- ### INTEREST.
1. On a debt by covenant in marriage articles, without mention of interest, the Court would not reduce it lower than five per cent. *Swynfen v. Scawen*. 68
The like interest allowed on a legacy for mourning. *ibid.*
 2. The rate of interest on legacies, whether out of personal or real estate, altered since the time of Lord Hardwicke. The Court now allows but four per cent. from the end of one year from testator's death, without distinction; the case of maintenance, however, being an exception. *Bryant v. Speke*. 97
And *Coleman v. Seymour*. 113
 3. Construction of will. Interest of legacy from the death of the testator on the manifest intent as to the maintenance. *Beckford v. Tobin*. 153
 4. Money charged on an estate in Nevis held only to carry English interest. *Stappleton v. Conway*. 185
 5. Husband of a tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by reversioner after the wife's death, no interest allowed to

the husband during his wife's lifetime. *Amsbury v. Brown*.

Page 202

As to tenant in tail keeping down the interest of an incumbrance. *ibid.*

6. Covenant, before the act reducing the rate of interest, to pay six per cent. is not prejudiced by the act; but interest turned into principal by the course of the Court, was directed to carry interest at five per cent. only from the passing of the act. Interest by course of the Court discretionary. *Astley v. Powis*. 202
7. No interest given on arrears of a voluntary annuity. Nor without a very special case, on arrears of annuities in general; or on arrears of maintenance, simple contract debts, &c. *Duke of Bedford v. Coke*. 293
8. Interest not allowed on arrears of jointure, except in a very special case; and it has been refused in very hard cases. *Anonymous*, 436; and *Duke of Bedford v. Coke*. 293
9. Interest on a banker's note from circumstances, though no evidence of an agreement for it. *Jacomb v. Harwood*. 330
10. Demand of interest on arrears of annuity waived, as not likely to prevail under the circumstances. *Morris v. Dillingham*. 320
11. As to rate of interest. *Denton v. Shellard*. 332
12. Under a trust term, by deed, to pay debts and legacies, held, that simple-contract-debts did not carry interest. So likewise as to a will. *Contra*, however, if by any act in the nature of a specialty from whence an intention can be inferred, as if the debts be annexed by way of a schedule. Page 359
13. Scrivener, &c. receiving money, and giving a note to place it out at interest, is bound to do so, and is not discharged from paying interest for it, unless his employer accepts the security and interest. Balance of an account stated by such scrivener, &c. will carry interest. *Barwell v. Parker*. 359
14. Generally speaking, to warrant a reservation of interest on further directions, it should have been directed on the original Decree. The case, however, of a direction for a trial at law is an exception; and there may be others founded on the peculiar nature of a case. *Champ v. Moody*. 387
15. Interest computed on various sums reported due, and also on all arrears of interest (on other sums) and costs. But this was under very special circumstances. *Bickham v. Cross*. 388
16. Though in general cases portions out of real estate carry interest in their nature without particular mention, yet after a great length of time and some laches, &c. the commencement of interest was fixed from the time of the sum to be raised having become a duty decreed on a former occasion. *E. Pomfret v. Lord Windsor*. 389, 391

17. Lessor covenants for quiet enjoyment, and devises his estate in trust to pay debts. Lessees, being evicted, recover against his executors, and assign the judgment. This is a debt by specialty, and the assignees are entitled to interest. *E. of Bath v. E. Bradford.* Page 420

INTERROGATORIES.

- A party to a cause may be examined on new interrogatories in the Master's office without a new Order, the Master being the proper judge. In the case of a witness it is different, for under a commission to examine, there must be a new Order for new interrogatories. *Cowslade v. Cornish.* 340

ISSUE AT LAW.

See also, TRIAL, NEW TRIAL, WILL, &c.

1. On *quantum damnificatus* by non performance of a covenant to rebuild houses. *City of London v. Nash.* 14
As to the propriety of a Court of Equity's interference in such a case. *Vide* 15
2. Issues directed as to the forgery of a will and other instruments, and Decree on the result on the equity reserved. *Barnesly v. Powel.* 74 and (143)
3. All the witnesses to a will must be examined at Law, under an issue in a suit to establish a will. *Vide in Ogle v. Cook.* 103
4. Issues at Law on a forged will, &c. and Orders made after verdict. *Barnesly v. Powel.* 143, &c.

JOINT-TENANCY.

See also TENANT IN COMMON.

1. Implied gift in the surviving interest of a lease which had been renewed by A. in the joint names of himself and brother, on the ground of intention, though proved but by one witness. *Maddison v. Andrew.* Page 45, 46
2. A father having provided for his eldest son, but not for his other children, takes a security for the proceeds of an estate sold in the joint names of himself, and eldest son. Held a trust for the father's personal representatives. *Pole v. Pole.* 54

JOINTURE.

1. The parties entitled to an estate, subject to jointure, upon confirming that jointure, are purchasers of the jointress's interest in incumbrances paid off by her fortune, and assigned for the better security of her rights under the settlement. *Earl of Portsmouth v. Lady Suffolk, &c.* 28
2. Though an offer be made to confirm a widow's jointure, she is not obliged to discover the title deeds until the offer be effectuated. She must, however, state the date of her jointure deed, whether it was executed at that time, and the premises. *Leech v. Trollop.* 436

JURISDICTION.

See likewise EQUITY.

1. The Court of Chancery has no jurisdiction in charitable Institutions regulated by charter, &c. *Attorney General v. Smart.* 53

Nor has it jurisdiction to interfere with the election of Members of Colleges, or misapplication of their funds, &c. where the appointment of a General Visitor can be inferred. *Attorney General v. Talbot.* Page 57

2. Bill for an account does not lie on behalf of a master for the earnings of his apprentice, the remedy being at Law.—*Martin v. Martin.* 114

3. Plea to the Jurisdiction.—*Green v. Rutherford.* 201

4. Where trustees of a charity have discretionary powers, the Court will not interpose unless they act corruptly. Though it may not choose to interpose, it does not follow that an information seeking the Courts interference will be dismissed, since it may be serviceable to maintain a control over them.

Where there is, in point of substance, a visitor, it excludes the general interference of the Court, either by commission within the 43 Eliz. or its ordinary jurisdiction. *Attorney General v. Governors of Harrowschool.* 406

5. As to the Jurisdiction of Foreign Courts. A commission granted to examine at Paris as to the extent of Jurisdiction of a particular Court erected there, but not as to the original constitution of it. *Gage v. Lady Stafford.* 408

L.

LACHES.

See LENGTH OF TIME.

1. As to neglect of a mortgagee

in obtaining the title deeds. *Ryall v. Rowles.* Page 166

2. Injunction until hearing, to restrain an action by a bankrupt against the assignees under his commission, upon the ground of his long acquiescence under the commission. *Flower v. Herbert.* 354

LENGTH OF TIME.

See LACHES.

1. Length of time how far a bar to an account in Equity. 391
Though stale accounts are discouraged, yet an administrator who was to see to the execution of a trust out of real estate and was accountable for the amount, was not allowed to take advantage of the length of time elapsed. *E. Promfret v. Lord Windsor.* 389, 391

LAPSE.

See LEGACY, RESIDUE, EXECUTOR, &c.

1. A bequest out of real estate to be paid within 12 months after the death of A. The legatee survives A. but lives only one month after her; held not to have lapsed. *Hodgson v. Rawson.* 37

2. The benefit of a bequest forgiving a debt due from A. and directing the security for it to be given up, not lost by way of lapse, by the death of A. in the lifetime of the testatrix. *Sibthorp v. Moxton.* 39

3. Executory trust for three, for their lives as tenants in common; if any died without issue living at their deaths, their shares to go to survivors; with contingent remainders in tail; and remainders over.

Two of them dying in the lifetime of testatrix, held, their shares lapsed and went over. *Sperling v. Toll.*

Page 52

4. The nomination of a master to a Charity-school not subject to the general rules of lapse, as in cases of presentations to Livings. *Attorney General v. Wycliffe.* 60

5. Bequest of a contingent interest in personalty, void where the preceding gift never vested, owing to a lapse. *Miller v. Faure.* 63

6. A person having power to appoint £4000 to any of her kin; and for want of appointment, to go according to the statute, appoints it to her nephew "upon condition" that he paid his mother (one of the next of kin) an annuity; though the nephew died in her lifetime, whereby the appointment as to him became void, his mother held entitled to her annuity. *Oke v. Heath.* 82

7. An ulterior appointment to a niece "of all the rest, &c. of what she had power to dispose of," held to pass the residue of the above sum which had thus lapsed. *ibid.*

8. Grant of personal estate by deed to trustees, for a niece after the death of the grantor, passes to her representatives, although the niece died in the grantor's lifetime. *Peck v. Parrot.* 128

9. A testator having desired J. "to leave" D. 500*l.* at her death, out of the money bequeathed her, and D. having died in J.'s lifetime, after

surviving the testator; held that such bequest did not thereby lapse; amounting to a legacy from the original testator. *Medlicot v. Bowes.*

Page 112

10. Devise of 30,000*l.* to testator's wife for life, and afterwards to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of the children who died in her lifetime. Held that their representatives were not entitled; and that the shares so appointed to them lapsed, and fell into the residue. *D. of Marlborough v. Lord Godolphin.* 277

LEASEHOLDS.

As to the contribution and apportionment towards renewals of leases. *Verney v. Verney.* 188

LEGITIMACY.

See *Baker v. Hart.* 27

LEGACIES.

See also EXECUTORS, LEGATEES, &c. &c.

1. A bequest out of real estate, to be paid within 12 months after the death of A. The legatee survives A. but lives only one month after her. Held not to have lapsed. *Hodgson v. Rawson.* 37

2. Legacy given to the children of S. she then having but one; held for the benefit of all born, or to be born. *Maddison v. Andrew.* 45

3. A daughter being a creditor

under her father the testator's marriage articles, and having a legacy bequeathed to very near the amount, an account was directed as to the testator's personal estate at the respective times of making his will, and of his death. *King v. Philips*. Page 125

4. Legacy of stock—Erroneous descriptions.—Satisfaction.

Door v. Geary. 132

5. Bequest of goods on board a ship is good, though they may have been afterwards removed, and were not on board at the testator's death. Neither choses in action, nor securities for money, pass under a bequest of "goods and chattels." *Chapman v. Hart*. 138, 139

6. Specific legacies of stock, *et c contra*. *Avelyn v. Ward*. 184

7. Plate passes under a bequest of "household goods." *Stapleton v. Conway*. 186, 187

8. A father, having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it during the daughter's life. This held a satisfaction, and the husband not entitled. *Seed v. Bradford*. 209

9. Construction as to legacies, specific and otherwise. Bequest "of 400*l*. East India bonds," under the circumstances not specific; but a legacy of quantity, to be made good out of the general assets; the testatrix having repeatedly, in this bequest, omitted the word "my," which she

had used in other bequests clearly specific; and having only one East India bond at her death.

Bequests of South Sea Stock, in parcels, to a larger amount than testatrix was possessed of, held specific, the bequest of the last parcel being called "the remaining S. S. stock standing in her name."

These legatees must abate in proportion *inter se*. *Sleeck v. Thorington*. Page 415

10. Bequest "to the two servants," that should live with testatrix at her death: she had three at that time, and all of them entitled. *Sleeck v. Thorington*. 415, 416

11. Specific legacy, if existing, the whole paid, though nothing left for pecuniary; but if not existing, the right is gone.

A debt specifically bequeathed, and afterwards voluntarily paid in, no ademption of the legacy; if a compulsory payment, it may or may not be an ademption according to circumstances; for if a particular reason is given, or if replaced on same fund, or so ordered, it is no ademption.

Bequest of a note for 500*l*. "in the hands of F.;" when F. had laid it out in stock unknown to testatrix. Though the bequest of the note is specific, the legatee shall have the stock in which it is vested. *Drinkwater v. Falconer*. 429

12. Bequest of a much larger legacy than a debt due from testator, on a condition which, by a subsequent deed, it be-

came impossible to fulfil, held to be a satisfaction, though it would not have been so from the will alone. Small circumstances will free such bequests from the rule of constructive satisfaction. *Mathews v. Mathews.*

Page 433

See also *Clark v. Guise.* 425

LEGATEES.

See also LEGACIES, RESIDUARY LEGATEE, &c.

1. A sale directed in favour of creditors, or a devise of "rents and profits" alone, and although contrary to the testator's intention. Held otherwise as to legatees, under the same instrument. *Baines v. Dixon.* 36
2. A legatee voluntarily paid by an executor not obliged to refund to the rest, except in the case of his insolvency; and it seems, even as to that there is a distinction. *Orr v. Kaimes.* 324
3. Real assets followed under administration bonds by legatees, creditors have no such right. *Ashby v. Bailie.* 362
4. As to whether residuary legatees paid by executor shall refund to legatees who were not paid immediately. *Moore v. Moore.* 422, 423
5. A testator reciting the amount of a debt he owed A. according to his own computation of it, directs such amount to be paid out of his real and personal estate, and bequeaths an annuity to A. for life out of his real and personal estates. Such creditor may en-

joy the annuity, and be at liberty to dispute the testator's calculation of the debt. *Clarke v. Guise.* Page 425
Vide also Mathews v. Mathews. 433

LIEN.

See also ATTORNEY and CLIENT, CLERK in COURT, &c.

1. No lien on a ship, or the proceeds from sale of it, for repairs done at home. *Buxton v. Snee.* 84
2. Pawnees of goods permitting a bankrupt to continue in possession, or the order and disposition of them, have no specific lien against the assignees. *Ryall v. Rowles.* 165
3. See *Lord Townshend v. Windham.* 243
4. Bill of sale of a ship assigns the property. The contractor who had only been paid half the expenses of the building, having thereby the legal and equitable interest, is entitled to be paid his whole demand; and the parties interested, or their estates, must settle their proportions and rights between themselves.—As to the lien of a vendor of real estate for the purchase money. *Walker v. Preswick.* 427

LIMITATION TOO REMOTE.

See also ESTATE-TAIL.

1. Interest of money given to A. for life, and for the heirs of his body, with a limitation over, if he died without issue A. takes the whole. *Butterfield v. Butterfield.* 81

2. A limitation over, "after legitimate heirs," too remote, unless capable of being confined to the period of the party's death. *Barret v. Beckford*. Page 219

LIMITATIONS.

(STATUTE OF.)

1. Bill lies by assignees of a bankrupt for account and delivery of goods, pledged by the bankrupt notwithstanding the Statute of Limitations. *Kemp v. Westbrook*. 141

LUNATICS.

1. There is a difference, in consideration of law and the strict rules of the Court, as to the case of a lunatic being let in to take exceptions to a Master's report after its being confirmed, and that of an infant; but it is equally open to the discretion of the Court in either case. *Earl of Bath v. Earl of Bradford*. 430
2. Specific performance of agreement decreed against one, who after entering into it, became a lunatic. *Owen v. Davies*. 60
As to various points and later statutes relative to lunatics. 60, 61, 62
3. In passing accounts of a lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs. Lunatic's comfort considered in exclusion to the presumptive rights of his next of kin, &c. Lunatic not stripped of support by act of the Lord Chancellor even for creditors. *Ex parte Wright*. 261

4. A commission of lunacy was refused in respect of a person of merely weak understanding, and imbecile mind. *Lord Donegal's Case*. Page 369

Sed vide ibid.

LUNACY.

5. Commission of lunacy to inquire as the lunacy of a person abroad, was directed where the party's mansion and more important estates lay. *Ex parte Southcot*. 369

M.

MAINTENANCE.

1. Though a tenant for life must keep down the interest of incumbrances, even if it exhausts the whole of the rents and profits, the Court will in some instances direct a reasonable maintenance for kin, if otherwise unprovided for. *Revel v. Watkinson*. 66
2. The Court will allow five per cent. interest on legacies given for maintenance; which is an exception from its general rule. 97, 113
3. Construction of will. Interest of legacy from the death of the testator on the manifest intent as to maintenance. *Beckford v. Tobin*. 153

MAN, ISLE OF.

The statutes of wills *et de donis conditionalibus*, do not extend to the Isle of Man. That Island made unalienable by a private Act of Parliament against heirs general, on failure of issue male. *Bishop*

of Sodor and Man v. Earl of Derby. Page 357

MARRIAGE.

Gift, on condition to marry with consent, where good, and where only *in terrorem*. *Berkeley v. Ryder.* 402
Provision by a brother in favour of sisters otherwise unprovided for, "upon their marrying with consent," construed as if made by a father. Such a provision, *aliter*, if made by a mere stranger.

ibid.

MARRIAGE (BROCADE.)

See in *Cole v. Gibson.* 211

MISREPRESENTATION.

See also FRAUD, &c.

Stated accounts set aside, the items being very gross, and obtained from a person just come of age, under a misrepresentation, &c. The party [a solicitor] charged with interest on monies directed to be laid out for the infant's benefit, notwithstanding a deed from its grandmother that he should not be so chargeable. *Brown v. Pring.* 181

MISTAKE.

1. Marriage settlement rectified by a strict settlement, agreeably to the ordinary course, notwithstanding it agreed with the articles verbatim, and both made before marriage. The Plaintiff, however, having taken a benefit under the will, which he disputed, held to have made his election, and decreed to give up part of the settled estate in

satisfaction. *Roberts v. Kinsley.* Page 129

2. Relief against agreement made under a misconception of rights. Agreement as to distribution of personal estate set aside, although ratified, the value appearing greater than was known to the Plaintiff at the time. *Cocking v. Pratt.* 176

3. General release from a sister to a brother not binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, and the brother having covenanted that he was seized in fee, contrary to the fact.

Satisfaction.—The sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deeds of release; the brother being a debtor to her to such amount on the face of it. A general release with a particular consideration recited, will be construed according to the particular recital. *Ramsden v. Hylton.* 350

4. Relief in Equity, on an instrument which had been drawn by mistake as a joint bond, and in respect of which the remedy at law was gone; the nature of the transaction implying the obligee's right to demand the consideration from the parties severally. The solvent obligor being dead, the demand available in Equity both against his executor and heir, though the real estate was liable only in default of the personalty.

Though a legal obligation, and penalty may have become void at law, the condition of it is considered in Equity, as an agreement to pay, regard being had to the nature of the consideration. *Bishop v. Church.* Page 298, 363

MODUS.

1. Vicar failing in a suit for tythes in kind, and a modus set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such modus. *Carte v. Ball.* 4

2. It is not absolutely necessary that the word "modus" should be used in laying one, nor a particular day for its payment stated.

The question of rankness of a modus, is one of fact, and not an objection *prima facie* in point of law. A Court of Equity will sometimes take upon itself to decide thereon in the first instance; where quite clear. But it generally leaves it to be tried at law. *Richards v. Syme.* 34

3. As to the distinction between a modus for tythes of particular things, and a *farm-modus.* 34

4. A doubtful modus not determined by a Court of Equity, without a trial at law. *Chapman v. Smith.* 395

5. An exception in the alleged modus that it was not to be paid when the land was planted with hops, not fatal in point of law on the face of it. *ibid.*

MORTGAGE.

See also INCUMBRANCE, PRIORITIES, &c.

1. If redemption of mortgage be resisted, when it should not, mortgagees will be ordered to pay costs. *Baker v. Wind.* Page 88

2. Where the question of mortgage or absolute conveyance, had been decided against the mortgagee in an issue, he was, on motion, directed to pay the costs forthwith, and not allowed to set them off in account. 88

3. As to neglect of a mortgagee in obtaining the title deeds. *Ryall v. Rowles.* 166

4. Husband of tenant in tail takes in a mortgage, and is in receipt of the rents and profits. On a bill to redeem by the reversioner after the wife's death, no interest allowed to the husband during his wife's life-time. *Amsbury v. Brown.* 202

As to tenant in tail keeping down the interest of an incumbrance. *ibid.*

5. A mortgagee being before the Court, not sent to avail himself of his securities at law, since the matter must finally come round to the same end on a bill to redeem. *Jacomb v. Harwood.* 338-9

6. Order made in favour of mortgagees, who had consented to a sale, in case the parties should delay it. 350-1

7. Held that a plea of foreclosure is not good without the foreclosure has been made absolute.

Though a mortgagee is not

bound to discover his title deeds where he denies notice, he must not only deny notice in general, but all special facts and circumstances charged relating to it. *Senhouse v. Earl.* Page 381

8. A second mortgagee, with notice of a former mortgage, but without notice of a former trust-charge, antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge. *Earl of Pomfret v. Lord Windsor.* 389, 391

9. Tacking.—A third incumbrancer may, *pendente lite*, and before a Decree, gain a priority over the second, by taking in the first. Such thing, however, not allowed after a Decree settling the priorities. Demurrer allowed on the latter ground.

Bill of review on new matter must be on leave of the Court, and affidavit showing the party's right; that it was not known to him at the time of the Decree, or since such other time as he could have used it for his advantage in the former cause. *Wortley v. Birkhead.* 418

10. A prior mortgagee may tack a subsequent judgment; but a prior judgment creditor obtaining a subsequent mortgage cannot.

A prior mortgagee, however, cannot tack a bond-debt against the mortgagee, his assignee of the equity of redemption, or creditors; though he may, as against the mort-

gagee's heir, to prevent a circuit. *Anonymous.* 436

MORTMAIN.

See also CHARITIES.

1. Assets not marshalled in favour of a charitable bequest, void under the Mortmain Acts. *Arnold v. Chapman.* Page 72
2. Devise before the Mortmain Act, and Codocil after it, not disturbing the charitable trust, but devising to the same use, and adding other trustees, not rendered void, though the codocil attempted to unite another piece of land. *Willet v. Sandford.* 104
3. The Court refused to effectuate an order, which had confirmed the Master's Report, where the subject matter of it arose upon an evident attempt in a testator to evade the Statutes of Mortmain. *Attorney General v. Day.* 115
4. Devise to a charity, before the Statute of Mortmain, of copyholds, unsurrendered, held good. *Attorney General v. Andrews.* 116
5. Void devise, under the Mortmain Acts. *Durour v. Motteux.* 157
6. Devise of a house to a college, not for academical or collegiate purposes, but merely to make it unalienable; held void. *Attorney General v. Whorwood.* 236
7. Right of the Crown to direct the uses of a charity contrary to law; or where the purposes expressed are too general and indefinite. *ibid.*
8. Devise to a charity by mort-

gaged in possession of all monies due on his securities, is within the Mortmain Act, 9 Geo. II. c. 36. So likewise of turnpike tolls, and money on security of poor's rates and country rates. *Attorney General v. Meyrick.*

Page 267

9. Mortmain, stat. 9 Geo. II. c. 36.

Bequest of residue of personal estate in trust, "to erect an hospital," decided here not to be void; it not being given to be laid out in land. And held here that in such case, the word "erect" did not of necessity imply "to build;" but only imported the foundation of a charitable institution metaphorically. *Vaughan v. Farrer.*

322
But settled now contra. Vide *ibid.* and 404

10. After a bequest, before the Mortmain Act, of 50*l.* charged on land to P. J. the minister of a Baptist meeting-house, certain other premises were devised away, charged with an annuity of 10*l.* "to the minister belonging to that meeting-house." This held a valid charitable bequest for the ministers in succession, and not personal to P. J. *Attorney General v. Cook.*

343

11. Lord Hardwicke's opinion, in the latter part of the Judgment, has been overruled; and the term "erecting," as applied to charities, is now held to mean the substantial part of the gift, not the mere building of any tene-

ments, &c. *Attorney General v. Bowles.*

404

Vide also

322

N.

NE EXEAT REGNO.

The affidavit to ground a writ of *ne exeat regno*, must not only state that the Defendant is equitably indebted in a specific sum, but must mention the facts on which it arises, &c. *Anonymous.*

392

NEW TRIAL.

Vide also *ISSUE, TRIAL, &c.*

1. See in *Baker v. Hart.* 27
2. No new trial where there must be the same issues, and no surprise, &c. on the former trial. Infancy no ground for it in such a case. Length of time a very great objection to such an application, both at law and in equity. A verdict founded on evidence discovered since the answer put in, and contrary to it, remains unprejudiced. *Legard v. Daly.* 109
3. New trial on Forged Instruments. Courts of Equity are much less strict in granting new trials, than Courts of Law; it being necessary, not that the question should be decided to the satisfaction of others, though ever so often, but that the conscience of the Court itself should be quite satisfied. *Stace v. Mabbot.*

407

NEXT FRIEND.

See likewise *INFANT, &c.*

The next friend of an infant allowed costs, though the bill had been dismissed; the Master having previously reported the suit for the infant's benefit. *Taner v. Ivie*.

Page 386

Sed vide ibidem.

NEXT OF KIN.

See also INFANT, &c.

1. Residue undisposed of, held vested in executors beneficially, and no resulting trust for the next of kin, although the executors had legacies given them. In this case, the executors were infants, and the legacies specific, distinct, and unequal. *Blinkehorne v. Feast*. 262
2. Testator, manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee; it was held that the executors were not entitled to the surplus. Where parol evidence can be read to show no resulting trust, like evidence may be read contra, to disprove the implication from the former. Legacy to one alone of two (or more) executors will not exclude either. Legacy to the daughter, &c. of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. *Bishop of Cloyne v. Young*. 285
- 3 Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from the residue. Legacy does exclude executors in

general; though not universally. *Andrew v. Clark*.

Page 314

4. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his lifetime, the Defendant held entitled to the whole residue, comprising those articles as lapsed; and the bill of the next of kin was dismissed; but without costs. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personalty. Sir J. Strange, M. R. held that executor, as such, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shown; calling him a 'legal residuary legatee.' *Wilson v. Ivat*. 317
5. Distinction between an executor as such taking a lapsed residue and a lapsed legacy. Held, that he does not take the former; as to the latter, *quære?* 318
6. Bequest of residue to go over in a particular event (which took place) to . . . (leaving a blank.) The executors excluded by such inchoate gift, and the next of kin entitled. Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guildford v. Purdon*. 394

NOTICE.

1. The agent of a party having notice of incumbrances, &c.

induces a necessity for that party to make all due inquiries, &c. as to the title; and such person cannot afterwards protect himself by procuring the legal estate. *Maddox v. Maddox*. Page 46

2. Notice to an attorney of a prior conveyance unregistered, will postpone a conveyance for the benefit of his client, which has been registered. *Le Neve v. Le Neve*. 50

Notice to an attorney, agent, &c. in the same cause or matter, is notice to the client or party. 50

3. Purchase of an equitable title to a rent-charge, claiming against purchasers of the land for a valuable consideration, without notice, must try his title at law in the name of his vendors. What shall amount to notice. *Whitfield v. Fawcett*. 169

4. In passing accounts of lunatic's estate, notice should be given to the parties next entitled; but they are not allowed any costs. *Ex parte Wright*. 261

5. A second mortgagee, with notice of a former mortgage, without notice of a former trust-charge, antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge. *Earl Pomfret v. Lord Windsor*. 389, 391

6. After a Decree for an account in a suit by parties interested in the surplus, where due proceedings take place between the Plaintiffs and Defendants, there is no occasion

to give notice to creditors. Costs having been given here in the first instance, they were to be paid before debts, &c. *Hare v. Rose*. 413

O.

OFFICE.

The grant of a menial office in the House of Lords, for a term of years, liable to creditors, and a daily fee or allowance held liable also. *Schellinger v. Blackerby*. 164

P.

PARTIES.

See also PLEADING and PRACTICE, &c.

1. To a bill by representative of the pawnee of a chattel against a third person, merely for the delivery of it, the owner need not be a party *Saville v. Tankred*. 70

2. In a suit relative to a testator's personal estate, it is unnecessary to make any other parties than the executor, he sustaining the person and power of the testator to defend for himself, legatees, and creditors. *Peacock v. Monk*. 80

3. A party to a cause may be examined on new interrogatories in the Master's Office without a new order, the Master being the proper Judge.

In the case of a witness it is different; for under a commission to examine, there must be a new order for new interrogatories. *Cowslade v. Cornish*. 340

4. Demurrer for want of parties.

Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "on behalf of themselves and the rest, a demurrer was allowed for not having made the whole crew parties. *Leigh v. Thomas.*

351

5. On a bill by devisee to redeem, the heir at law an unnecessary party. *Lewis v. Nangle.*

378

6. See *Walker v. Prewick.*

427, 428

PARTITION.

Partition will be decreed in Equity as to tythes. *Baxter v. Knollys.*

235

PARTNERSHIP.

1. Mutual credit under partnership agreement. *Welford v. Bezely.*

6 and 7

2. Representatives of partner entitled to set off debts, and have all allowances, before the separate creditors of the other can take his share; and they have a lien for such demands. *West v. Skip.*

130

3. Though it was held in *San-sum v. Braggington*, p. 191; and *Doddington v. Hallett*, p. 205, that part owners in a ship should be considered as partners, the law is now otherwise.

Vide pages 193, 205.

4. Equities as between solvent partners, &c. and the estate of a bankrupt, &c. *Ryall v. Rowles.*
5. Articles of partnership do not survive for the benefit of executors, &c. without an express provision for such purpose. The same as to assign-

nees of bankrupts The rights as between the parties in such instances, and through them the rights of their creditors. *Pearse v. Chamberlain.*

Page 264

6. Judgment in action against a surviving partner, no extinguishment of the partnership debt in equity. *Jacomb v. Harwood.*

338

PART-OWNERS.

7. Though it was held in *San-sum v. Braggington*, p. 191, and *Doddington v. Hallett*, p. 205, that part-owners in a ship should be considered as partners. The law is now otherwise.

193, 205

PERFORMANCE.

See also COVENANT, SATISFACTION, &c.

1. A husband covenanting to grant his wife by deed or will £1000 at his death, if she survive him, but dying intestate without having done so, held that she was not entitled to her distributive share in addition to her claim under the covenant. *Lee v. D'Aranda [and Cox.]*

1

As to the distinction between cases of satisfaction and of part-performance, &c.

3

2. The purchase of houses in London, and of lands of the tenure of borough English, held not to be a due execution of a covenant in marriage articles to purchase or settle "lands of inheritance." *Pin-nel v. Hallett.*

344

PERPETUITY.

Trust of the residue of a term with a double aspect, viz.

Settlement on marriage by deed of leasehold estate in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, with the rents and profits, to the eldest son; "and for want of such issue of such son," to daughters.

A son having been born, who died without issue in the life of the mother, held that it did not vest in him, but was a good remainder to an only daughter at the death of the surviving parent.

The Decree in this point affirmed on appeal 2 Ves. 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred. *Exel v. Wallace.*

Page 295-6

PERSONAL ESTATE.

See also RESIDUE, &c.

Redeemable annuities for the life of grantee, secured by terms for years, taken in satisfaction of a debt, held part of the grantee's personal estate, and similar to Welsh mortgages. *Longuet v. Scawen.* 180

PLEADING.

1. A specific charge that the Plaintiff's title would appear

as stated, contrary to one alleged to be insisted on by the Defendant, must be met by plea or answer; and not being so, a general demurrer was overruled. *Stroud v. Deacon.* Page 33

2. It is not absolutely necessary to use the word "modus," in laying one, nor to state a particular day of its payment. *Richards v. Evans.* 34
3. In order to bind "assigns" or "heirs," under a covenant, the bill must state them to be so bound, or it will be demurrable. 45
4. Plea that the Chancellor of the University of Oxford was visitor of one of the Colleges, held good to the whole of the relief and discovery. See the plea set forth, *Attorney General v. Talbot* 57
5. To a bill by representative of the pawnee of a chattel, against a third person, merely for the delivery of it, the owner need not be a party. *Saville v. Tankred.* 70
6. A plea to the jurisdiction of the Court, must show what other Court has jurisdiction. *Earl of Derby v. Duke of Athol.* 111
7. Plea of a general agreement and composition of accounts, good, without its being a minute strict settlement of items. *Seewell v. Bridge.* 152
8. A plea allowed to a bill for an account of an intestate's personal estate of an inventory delivered, and approved, and of an agreement thereon founded, without fraud, &c. *Cocking v. Pratt.* 179

9. If a bill charges a party to be interested, who, if not so, would be properly examinable as a witness, the Defendant cannot demur, but must plead, and support it by an answer, denying such charge. *Plummer v. May.* Page 185
10. Plea to the jurisdiction. *Green v. Rutherford.* 201
11. The interrogating part of a bill must be supported by a substantive charge. *Attorney General v. Whorwood.* 236
12. As a plea containing an exception of matters therein-after mentioned, is bad, and must be overruled; so a plea of a release, "further and other than in the plea set forth," is incorrect, though not so much as to overrule it. *Salkeld v. Science.* 288
13. Plea on the ground of forfeiture must be confined to protect against a discovery of the act causing it, and not extend to matters collateral. *Weaver v. Earl of Meath.* 289
14. Length of time proper for a plea, but not for a demurrer. *Gregor v. Molesworth.* 289
15. Bill of inter-pleader dismissed with costs, where the question could be determined in the principal suit. *Lloyd v. Tench.* 326
16. Plea allowed to discovery of a marriage which would subject one of the parties to punishment in the Ecclesiastical Court; the other being dead.
What averments are proper to support a plea.
- Demurrer.—Questions even of title, construction of will, &c. determined on demurrer, if quite clear on the face of the bill, that the determination must be on the same matters in the more protracted way at last. *Brownsword v. Edwards.* Page 334
17. Demurrer for want of parties.—Part of a ship's crew appointed two to be agents. On a bill for an account by such agents in their own names, and not "on behalf of themselves and the rest," a demurrer was allowed for not having made the whole crew parties. *Leigh v. Thomas.* 351
18. Plea allowed as to discovery, whether one from whom the Defendant purchased was not a Papist. *Harrison v. Southcote.* 366
19. Plea good in part, and in part disallowed. Plea of the statute of limitations, not to the general account prayed, but to an account between Plaintiff and his father in his lifetime allowed, with an exception of one article. As to the plea of the statute on merchants accounts. *Welford v. Liddel.* 368
20. Lord Hardwicke held that in case of a bill for discovery of a Defendant's title, he might object to make such discovery by his answer, as well as by plea, &c. *Buden v. Dore.* 379
21. Held that a plea of foreclosure is not good without the foreclosure has been made absolute.
Though a mortgagee is not

- bound to discover his title deeds, where he denies notice; he must not only deny notice in general, but all special facts and circumstances charged, relating to it. *Senhouse v. Earl*. Page 381
22. A demurrer should precisely distinguish each part of the bill demurred to. Though parties may demur to discover any thing which may prove illicit cohabitation, or what may subject them to pains, penalties, or ecclesiastical censures, &c. a charge against persons of a conspiracy, or attempt to set up a bastard child, is not demurrable unto; that not being, *per se*, an indictable offence. *Chetwynd v. Lindon*. 382
23. A decree cannot be pleaded, unless it has been signed and enrolled. *Kinsey v. Kinsey*. 419
24. Supplemental bill, in nature of a bill of review, must be accompanied with a petition to re-hear or appeal. *Moore v. Moore*. 422
25. Rule as to strict bills of review, is that the Decree can be varied only upon errors complained of, except as to matters merely consequential upon the variation made. Same rule as to appeals in the House of Lords. *ibid*.
- PORTION.
- See also SATISFACTION, &c.
1. Liberal construction in favour of the vesting of portions. Survivorship as between the children referred to their not attaining 21, or marriage, though no express words to that effect; there being a preceding clause as to other children, where the like words were used. *Mendes v. Mendes*. Page 65
2. As to satisfaction of portions, see *Duke of Bridgewater v. Egerton*. 296
3. Trust "to raise" 5000*l.* portion "and pay it" to such younger child as the father should appoint; for want of appointment to the younger children at 21, with interest for their maintenance, &c. in the meantime, &c. &c. The only younger child at two years old. Held not to be vested in him, so as to be claimed by the father as his representative. Portions by will governed by rules from the civil law, not applicable to a deed. *Hubert v. Parsons*. 337
4. Marriage settlement on husband and wife for life, and trust term, if no issue male, or if all should die without issue male before 21 years, to raise portions for daughters, &c. A son attained 21, but died in father's lifetime, without issue male. The portions not raiseable. Where a term for securing portion has been misplaced in a settlement, &c. so as to be defeasible at Law, it will be rectified in Equity. *Worsley v. Earl*. 353
5. The vesting of, suspended during the father's lifetime. *Loder v. Loder*. 402
- POSTHUMOUS CHILD.
1. A posthumous child within a provision of marriage as should be living at the death

of the father or mother. *Miller v. Turner*. Page 63

For various other points, see 63, 64

2. Posthumous brother of the half blood entitled under the Statute of Distributions. *Burnett v. Mann*. 85

POST-OBIT SECURITY, CONFIRMATION, &c.

See also EXPECTANCIES, &c.

A. aged 30, borrows £5000 on bond to pay £10,000 if he survives B. aged 78. A. survives a year and eight months, having on death of B. confirmed the bargain by a new bond, &c. freely; and paying part. No relief given in this case, except as to the penalty. *Earl of Chesterfield v. Janssen*. 297

2. Courts of Equity more strict now in such cases, and in bargains for expectancies, than formerly. 297-8

And *Evans v. Chesshire*. 300

POWER.

See also APPOINTMENT, &c.

1. A discretionary power given to executors, is not determined by the death of one of them. *Flanders v. Clark*. 12

2. Devise to A. in fee, with directions to settle on descendants of his mother for their several lives, &c. A. may limit an inheritance to effectuate the general intents. *Godolphin v. Godolphin*. 22

3. Power reserved by owner of the inheritance, substantially executed by an indirect charge, not referring to the

power. *Maddison v. Andrew*. Page 45

4. A person having power to appoint £4000 to any of her kin, and for want of appointment to go according to the statute, appoints it to her nephew, "upon condition" that he paid his mother (one of the next of kin) an annuity. Though the nephew died in her lifetime, whereby the appointment, as to him, became void, his mother held entitled to her annuity. *Oke v. Heath*. 82

An ulterior appointment to a niece, "of all the rest, &c. of what she had power to dispose of," held to pass the residue of the above sum, which had thus lapsed. *ibid*.

5. Appointment pursuant to a power, good, though executed by will of a feme covert. *Barnet v. Brown*. 85

6. Power of appointment by a father, not well executed, according to a reasonable construction of the recital of the deed, which created the power. *Burleigh v. Pearson*. 143

7. Distinction between powers and absolute interests. A general power of appointment given over an estate in lieu of a present interest in it, having been executed voluntarily, though for a daughter, was held to be assets in favour of creditors. As to these assets, however, as between the creditors, it was held that a creditor by judgment entered into for securing a portion given by the debtor on the marriage of his daughter,

was entitled to a preference.
Lord Townshend v. Windham. Page 243

8. Mere power unexecuted in a tenant for life, who becomes bankrupt, does not vest in his assignees. *ibid.*

9. Devise of £30,000 to testator's wife for life, and afterward to be distributed among his children, as she by deed, will, or instrument in nature of a will, should appoint. She, having married again, appoints by will (*inter alia*) unto two of the children who died in her lifetime. Held that their representatives were not entitled; and that the shares so appointed to them lapsed, and fell into the residue. *D. of Marlborough v. Lord Godolphin.* 277

10. Appointee under a power, must claim not only under the power, but according to the nature of the instrument under which it is executed. If an instrument is to operate as a will for the execution of a power, it must have all the incident consequences of a will. In the case of a will to pass lands by virtue of a power, it must be executed according to the provisions of the Statute of Frauds. And so in the case of a testament to pass personalty under a power, it must be such an instrument as is capable in its own nature of passing personal estate.

So in the case of copyholds surrendered to the use of a will, and certain uses appointed by will, if the appointee die in the testator's life-time,

his representative cannot take any benefit; although the rule is generally, that copyhold lands pass by the surrender. The reason is, that the act is not complete in such case, from the non-operation of the will in the testator's life-time. When the execution of a power is by will, and is not expressed in the precise words which would be required in a deed; as under a clear intent to create an estate tail, though not formally worded, there the Court will effectuate such intent, notwithstanding the appointee takes, in some sense, under the power.

And so in like cases where, in any power, there is also one of revocation, and to appoint new uses, and the power itself is executed without any like reservation of a new power to revoke, the act (if substantive from the nature of the instrument) is irrevocable.

Appointee under a power, takes under the authority of that power, as if therein mentioned, in so far as relates to the substance of the benefit, but he does not take as from the time when the power was created.

Mere powers construed strictly:—Powers coupled with an interest construed liberally. *D. of Marlborough v. Lord Godolphin.* 277, 279

11. Father tenant for life, and two sons, article to charge [an estate] with a sum for younger children after the father's death, as he by will,

duly executed, should direct. He directs by will with two witnesses only. A good execution of the Power, nothing passing from the father. Otherwise, if by owner of the estate. *Jones v. Clough. Sed Quære?* Page 3

12. In the exercise of a power to appoint amongst children, each must have a part, not illusory, nor reversionary: but a particular interest, as for life, may be given to any. Such a power will not extend to grand-children; nor can a discretion be given to another to make the appointment. Though such an attempt would be void, it would not devolve on the Court to appoint. The court only interferes, where the power is well created, but by accident cannot be executed at all. *Alexander v. Alexander.*

434.

13. Where given to those not capable, together with another who is capable, the latter will take the whole. Under such a power, it cannot be given free from the debts of the appointee. *ibid.*

PRACTICE.

See PUBLICATION, &c.

1. Though an information relative to a charitable use will not be dismissed, on any formal grounds, where a clear right is to be settled, it will yet be dismissed with costs, if no charitable funds in question, and no distinct ground made out in proof, for the Court's interference. *Attorney-General v. Parker.* 37

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2. Though an information relative to a charity, where the subject is fit, and the Court has proper jurisdiction, will not be dismissed because it prays wrong relief, &c. it is otherwise in many cases where the Court may not think proper to interpose; and an information will always be dismissed with costs if the Court has not properly full Jurisdiction, as in Foundations under a charter, &c. *Attorney-Gen. v. Smart.* Page 53

3. As to the late act for the regulation of charities on petition only. 53

4. There must always be some relators before the Court to answer for the costs in charity matters. 53

5. As to the Practice of the Six Clerk's Office, and the necessity for Bills to be entered in the Bill-book to warrant an attachment for non-appearance. 42

Another Book is kept at the Six Clerk's Office for entry of bills not filed, in order that Defendants who have appeared in such suits may "prefer costs." 42, 43

Attachment for non-appearance irregular if the bill is not entered in the Bill-book in the Six Clerk's Office. 42

6. Voluntary release by a party to his adversary not to defeat the Clerk in Court of his lien for costs. If the suit had ended on a *bona fide* compromise for a reasonable consideration paid, it would have been otherwise. *Anonymous.* 261

7. As to rights and remedies

- of Six Clerks, and Clerks in Court, for their fees, their lien on papers, &c. Whether Six Clerk can stop proceedings until paid his fees which had been paid to the Clerk in Court of his division, who had absconded. *Taylor v. Lewis.* Page 290, 291
8. Clerk in Court cannot be changed at the mere will of a party. *Taylor v. Lewis.* 290, 291
9. Orders for service of process discretionary. Where neither the party, nor her Clerk in Court, could be found, the Court ordered that the service of a subpoena to her judgment, on her Solicitor, should be deemed good service, if accompanied by a copy of the Order left at the last place of abode. *Anonymous.* 257
10. Costs are refunded upon the reversal of an Order which had allowed a demurrer. *Oates v. Chapman.* 241, 287
11. If Plaintiff is abroad, and the Defendant becomes apprized of it, he cannot obtain security for costs, if he afterwards takes any other step in the cause; such as applying for time to answer, &c. *Melloruck v. Same.* 260
12. Defendant in custody for want of further answer, putting it in, will be discharged on paying the costs of the contempt. If that answer, or any further one, proves to insufficient, the Plaintiff may resume the process where it left off. *Child v. Brabson.* 290
13. Revivor is allowed for costs taxed. Costs die with the party unless taxed; and even where taxed in the lifetime of such party, and the person to pay them is in prison, he will be discharged unless there be a revivor within a reasonable time; this is in like manner as in a case of sequestration. Difference between process at Law and in Equity. Process in Equity is *in personam*, for a contempt; not so at Law. Writs of execution at Law, and writs of Fi. Fa. do not abate. Writ of sequestration in Equity does abate. The Court, however, will allow time to revive. Process of sequestration in Equity nearly resembles that of Fi. Fa. at Law; but there is the above material distinction, in case of the party's death. *White v. Hayward.* Page 385
14. Though the strict rule be, not to allow revivor merely for costs which have not been taxed, the Court leans against enforcing it, if there be any thing in the Decree yet remaining to be executed. *Johnson v. Peck.* 386
15. The ancient sum of 40*l.* as the amount in which security must be given to answer costs on the plaintiff's residing abroad, is not increased under adverse motion on any special circumstances. If, however, such a Plaintiff asks a favour of the Court, further terms may be imposed on him. *Gage v. L. Stafford.* 413

16. No Decree in Equity on the testimony only of one witness, against a positive denial by answer, uninfluenced by other circumstances. Page 51
17. As to how far the answer of one Defendant may affect another Defendant.
See 56, 57
18. Though one witness cannot sustain a suit against a distinct denial by answer; the latter must be precise, and positive. *Arnott v. Biscoe.* 67
19. A stated account and release being set aside, relief not given to the Defendant on a cross bill for another independent matter, until he should account fully in the original suit. *Skish v. Foster, et c contra.* 65
20. To a bill by representative of the pawnee of a chattel against a third person, merely for the delivery of it, the owner need not be a party. *Saville v. Tankred.* 70
21. In a suit relative to a testator's personal estate it is unnecessary to make any other parties than the executor, he sustaining the person and power of the testator to defend for himself, legatees, and creditors. *Peacock v. Monk.* 80
22. A purchaser or mortgagee under a Decree of the Court is answerable for the application of the money if not paid into Court. *Lloyd v. Baldwin.* 101
23. As to Bills to *pro confesso*. *Wharam v. Broughton.*
104, 105
24. Confirmation of Master's Report opened, and the report allowed to be excepted to, or reviewed, under particular circumstances; although previous had been disallowed after argument. *Hawkins v. Day.* Page 106
25. Enrollment of a Decree set aside under particular circumstances; but not if made on the merits. *Kemp v. Squire.* 112
26. A demurrer may be put in after a plea is overruled. *East India Company v. Campbell.* 131
27. On reversing an Order for allowing demurrer, the costs are refunded. *Oates v. Chapman.* 241, 287
28. Enrollment of a Decree vacated, having been done too expeditiously. *Wright v. Wright.* 158
29. As to the process on a Decree for possession of land. 194
30. Husband being abroad, a wife having appeared and obtained an Order to answer separately, whereby she freed herself from process of contempt, will not be allowed to have her own acts set aside. *Travers v. Bulkely.* 168
31. The whole line of process having been gone through against the Plaintiff's husband, who had not appeared, is equal to the proceeding to outlawry at Law; and there may be a Decree for transfer of her separate property against the other Defendants who did appear. *Vanessen v. East India Company.* 170
32. As to reference to the Master to ascertain whether two

suits are for the same matter or otherwise. *Gage v. Lord Stafford and Furness*,

Page 242

33. As to the mode of computing the value of premises in the Master's office, See *Pinnell v. Hallet*, 2 *Ves.* 277.

34. Reference for scandal may be at any time; not so as to mere impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing scandalous that is strictly relevant to the merits. *Fenhoulet v. Passavant*. 260

35. After an original bill proceeded in, it is not a motion of course to enlarge publication on a cross bill; but notice must be given, &c. *Aylet v. Easy*. 356

36. A Defendant having become better apprised of any matters after putting in his answer, cannot contravene or question his own admissions, &c. on the subject by a cross bill. His proper course is to put the further facts on the record by way of supplemental answer. 403

37. After appearance, no special injunction (such as to stay the navigating of a ship) without notice. *Marasco v. Boiton*. 291

38. If injunction be dissolved on the merits, another cannot be obtained, as of course, on an amended or supplemental bill.

The injunction having issued irregularly, held the Defendant had not waived the objection by a mere application

for time to answer the bill. Objections as to irregular process can only be waived by a party doing some act expressly founded on it, or amounting to a clear affirmation.

The result of a reference under an Order of the Court, viewed by the Court as a Decree; and even stronger, since it supersedes all errors but corruption or partiality. *Travers v. E. of Stafford*. 256

PRESENTATION.

Void Presentation to a Living from some of the trustees taking an undue advantage of therest. *Attorney-General v. Scott*. 182

Trustees to present to a living cannot make proxies to choose an incumbent. *ibid*.

PRESUMPTION.

Owner of a rent-charge not to be presumed to have released it by suffering it to run largely in arrear: nor, without proof, to have done so to prejudice those in remainder. *Aston v. Aston*. 134

PRIORITIES.

See INCUMBRANCES, &c.

1. A second mortgagee with notice of a former mortgage, but without notice of a former trust-charge antecedent to both, and of which the former mortgagee had notice, was obliged to take, subject to that charge. *E. Pomfret v. Lord Windsor*. 389. 391
2. Deed of appointment of lands in a Register county pursuant to a power in a former deed

which was not registered, postponed to a mortgage made subsequent to it, & registered before it. *Scraston v. Quincy.* Page 371

3. A third incumbrancer may *pendente lite*, and before a Decree, gain a priority over the second by taking in the first. Such thing however not allowed after the Decree settling the priorities. Demurrer allowed on the latter ground. Bill of review on new matter must be on leave of the Court, and affidavit showing the party's right, that it was not known to him at the time of the Decree, or since such other time as he could have used it for his advantage in the former cause. *Wortley v. Birkhead.* 418

4. A prior mortgagee may tack a subsequent judgment, but a prior judgment creditor obtaining a subsequent mortgage cannot. A prior mortgagee, however cannot tack a bond debt against the mortgagee, his assignee of the equity of redemption, or creditors, though he may as against the mortgagee's heir, to prevent a circuit. *Anonymous.* 435 See also *Willoughby v. Willoughby.* 441, 442

PRIVILEGE.

The objection as to the examination of Counsel, Attorneys, Solicitors, &c. as witnesses, is not on the ground of any personal privilege in them, but for the sake of the client, or party concerned. Courts, therefore, both of Law and Equity will stop such disclo-

sure, or suppress such depositions if made to the party's prejudice. Page 48

PROBATE.

- A will relative (*inter alia*) to real estate, having been found by a verdict at Law to have been forged; the Defendant ordered to transmit and lodge the probate, &c. with the Registrar of the Ecclesiastical Court, &c. &c. *Barnesly v. Powel.* 143, 149, &c.

PROXY.

- Trustees for the presentation to a Living cannot make Proxies to choose an incumbent; tho' if a choice were properly made they might do so for the mere purpose of signing the presentation. *Attorney-General v. Scott.* 182, 183

PRINCIPAL AND AGENT.

- Plaintiffs intending to lend money to their brother in the East Indies, pay it to his agent in England, who remits in bullion. The brother was dead when the advance was made: his executors send the value of the bullion back to England, where it is received by the father. The agent's authority being revoked by the death of his principal, held it was no loan to the brother. The Court declared that the proceeds so received by the father ought to be answered out of his estate: but the parties compromised the matter at a less sum. *Eyre v. Eyre.* 282

PRINCIPAL AND SURETY.

1. On the marriage of A. his sister advances him £600, to make a present to his wife, and A. procures his father to give her a bond for the amount, payable at a month after his death. A. pays his sister interest during his father's lifetime, and for the month afterwards. On a bill by the sister against the representatives of her father and her brother; held a debt on the estate of the father, not to be indemnified by A. And the Plaintiff was also decreed her costs out of her father's estate.
It would have been otherwise, if such a transaction had been between strangers. *Hill v. Ballard*. Page 55
Accounts, memoranda, &c. of the father, read in favour of his representatives, altho' objected to by the other Defendant. *ibid.* 56.
2. Second tenant in tail joins in a mortgage and bond with the first, who receives the money lent. Held to be only a surety, and the real estate not liable in aid of the personal estate of the first, although he had joined in hopes to prevent a recovery. Parol evidence of an agreement between the parties deemed inadmissible. *Robinson v. Gee*. 131
3. Bill of Surety in a bond to have it assigned, after having paid its amount, dismissed with costs, as useless. *Gammion v. Stone*. 162
4. A father, tenant for life, pro-

cured his son who was tenant in tail, to join in raising money, which the father received and applied to his own use, decreed to exonerate the estate; the son being only in the nature of a surety for it as the debt of his father. *Piers v. Piers*. 220

PUBLICATION.

1. Where it is quite clear that an examination in chief is morally impossible, there may be a publication of depositions taken *de bene esse*. *Gascan v. Wordsworth*. 353, 357
2. After an original bill proceeded in, it is not a motion of course to enlarge publication on a cross bill, but notice must be given, &c. *Aylet v. Easey*. 358
3. Depositions *de bene esse* published, saving just exceptions, the witnesses being dead before an opportunity to have examined them in chief, tho' there was delay on both sides. *Anonymous*. 394

PURCHASER.

1. Neither trustees, or others in a confidential capacity, can derive advantage from a purchase on their own behalves, of the trust, or confided property. *Whelpdale v. Cookson*. 8, &c.
2. A Purchaser or mortgagee under a Decree of the Court is answerable for the application of the money, if not paid into Court. *Lloyd v. Baldwin*. 101
3. Purchaser of an equitable title to a rent-charge, claim-

- ing against some purchasers of the land for a valuable consideration without notice, must try his title at Law, in the name of his Vendors. *Whitfield v. Fawcett*. Page 169
4. Voluntary conveyance by a person indebted at the time, void against subsequent purchasers for valuable consideration, and creditors. If the party is not indebted at the time, and no fraud, it is good against creditors, though not against purchasers; by force of the statute 27 Eliz. c. 4. Difference between the statutes 13 Eliz. c. 5, and the 27 Eliz. c. 4. *Lord Townsend v. Windham*. 247
5. Purchaser for valuable consideration, without notice, is not bound by a private act of Parliament. 390

R.

RECEIVER.

1. The Court will not appoint a Receiver on bill by an heir at law against a devisee, unless there are strong circumstances. *Knight v. Duplessis*. 157

RECITAL.

See CONSTRUCTION. (16, and 22.)

Pages 149, 350, 351.

RECOVERY.

1. As to Lord Eldon's Act, see p. 103.
2. Questions as to legal and equitable recoveries, and trustees to preserve contingent remainders. *E. Portsmouth v. Lord Effingham*, 189

REGISTRY ACTS.

1. As to the difference between

the Registry Acts in England and those of Ireland. See p. 51.

2. Deed of appointment of lands in a register county pursuant to a power in a former deed which was not registered postponed to a mortgage made subsequent to it and registered before it. *Scrifston v. Quincey*, Page 371

RELATIONS.

1. The word "Relations," generally speaking, does not include those by affinity. A wife, therefore, does not answer such a description in the ordinary sense. See *Davies v. Bailey*. 62, 63
2. Bequest to "near relations," means those within the statute of distributions. *Whithorn v. Harris*, 401

RELEASE.

General Release from a sister to a brother not binding as to particular rights under the marriage settlement, or articles of the parents, the sister being ignorant of them, and the brother having covenanted that he was seized in fee, contrary to the fact.

Satisfaction. The sister held entitled to her claims under the settlement or articles, and also to the consideration recited and expressed in the deed of release, the brother being a debtor to her to such amount on the face of it.

A general release with a particular consideration recited, will be construed according to the particular recital. *Ramsden v. Hylton*. 350

REMAINDER AND REMAINDER-MEN.

1. Devise to A. and his heirs; and if he died without heirs, remainder to B. The devise being clearly of a fee, the remainder over void. *Tilburg v. Barbut.* 65
2. Windfalls of timber and other casualties to whom the property belongs. *Aston v. Aston.* 175
3. As to the right, powers, and duties of trustees to preserve contingent remainders. See in *Garth v. Cotton.* 233

RENEWALS.

As to contribution and apportionment towards renewals of leases. *Verney v. Verney.* 188

RENTS AND PROFITS.

1. Rents and profits undisposed of belong to the owner of the inheritance, or persons entitled to the enjoyment. *Hopkins v. Hopkins.* 137, 138
2. As to accumulation of Rents and Profits.—Intermediate rents and profits will pass by a clear devise of all the rest and residue of real estate. *Gibson v. Lord Montfort,* 203, 204
3. Devise of "rents, profits, and produce" of West India Estates to be consigned to trustees and applied by them in disencumbering an estate in Scotland of debts, and also in payment of other debts, funeral expenses, and legacies. Held, on re-hearing, that such charges could only be paid out of the annual perception of rents and profits; and that

part of the former Decree which had directed a sale was reversed. *Conyngham v. Conyngham.* Page 221

4. Grant or devise of "rents and profits," referable to a term in gross, or mere chattel interest, will pass the whole interest in the term without further words of limitation: but it is otherwise as a term carved out of an inheritance. *Belt v. Michelson,* 227

RENT-CHARGE.

As to a fine of land not bearing a Rent-charge issuing out of the land and belonging to a third person. *Vide p.* 170

REPUBLICATION.

See also REVOCATION.

1. Republication by a codicil. *Potter v. Potter,* 191
2. Republication as to lands purchased after a will by a codicil made after the purchase. *Gibson v. Lord Montfort,* 203, 204

RESIDUE.

1. Residuary bequest of personalty includes every thing, as a void bequest, or one that has lapsed. *Durour v. Motteux,* 157
2. As to the difference of the word "residue;" as relative to real or personal estate. A clear devise of all the rest and residue of real estate will pass intermediate rents and profits. *Gibson v. Lord Montfort,* 203, 204
3. Residue undisposed of, held vested in executors benef-

cially, and no resulting trust for the next of kin, although the executors had legacies given them. In this case the executors were infants, and the legacies specific, distinct, and unequal. *Blinkhorn v. Feast*, Page 262

4. Testator, manifesting an intention to dispose of the residue, but leaving it inchoate, inasmuch as he did not name the residuary legatee; it was held that the executors were not entitled to the surplus. Where parol evidence can be read to show no resulting trust, like evidence may be read contra, to disprove the implication from the former. Legacy to one alone of two (or more) executors will not exclude either. Legacy to the daughter, &c. of an executor is not to be deemed a legacy to him, so as to prevent his taking the surplus, merely for that reason. *Bp. of Cloyne v. Young*, Page 285

5. Legacy to next of kin, as well as to executors, though to ever so small an amount, does not exclude the next of kin from residue. Legacy does exclude executors in general, though not universally. *Andrew v. Clark*, 314

6. Testator reciting his intention to dispose of all his property, and that his daughter was likely to die [of a violent distemper], left his wife if she did die, the revenue and dividends of such property; but if his daughter lived, directed that his wife should only have her dower; giving the residue and dividend to that

daughter. If she died without children, testator gave his brother "all that should be left." The daughter survived the testator, but died of the same illness, without issue. — Held that the mother was still entitled for life; and that the words "what should be left," constituted a good residuary bequest to the brother. *Duhamel v. Ardovin*, Page 414

7. Testator having appointed his wife and the Defendant executors, and given his wife certain specific articles, and his wife having died in his life-time, the Defendant held entitled to the whole residue, comprising those articles as lapsed; and the bill of the next of kin was dismissed; but without costs. Devise of a real estate in fee to the wife of surviving executor, no objection to his taking the residue of the personality. Sir J. Strange, M. R. held that executor, as such, takes all that is not disposed of, whether by lapse or otherwise, unless a contrary intent is clearly shown: calling him a 'legal residuary legatee.'

Distinction between an executor as such taking a lapsed residue and a lapsed legacy. Held, that he does not take the former; as to the latter, *quære?* 315

8. Testator intending to dispose of all his personal estate, gives the residue in fifth shares; but appoints his brother "heir to whatever part of his estate should be unappropriated by his will." One of the five shares elapsed in testator's

lifetime. Held that the above was an ultimate general residuary clause; and comprised this, as including not merely what was not mentioned, but every thing not effectually given. *Jackson v. Kelly*.

Page 345

9. Bequest of residue to go over in a particular event (which took place) to . . . (leaving a blank.)

The executors excluded by such inchoate gift, and the next of kin entitled.

Next of kin not excluded from taking the residue by legacies bequeathed to them. *Lord North and Guildford v. Purdon*. 394

REVIEW, BILL OF.

1. As to a Bill of Review on new matter. *Earl of Portsmouth v. Lord Effingham*. 189

Et vide Mr. Beames' complete and valuable edition of the Orders in Chancery, p. 2.

2. Quære, whether a demurrer will not lie to a supplemental bill, in nature of a bill of review, upon the discovery of new matter on account of Plaintiff not having obtained leave of the Court, and made the usual deposit. *Cole v. Gibson*, 211

Et vide Mr. Beames' Orders in Chancery, 1. and notes, and 368, *ibid*.

3. A third incumbrancer may, *pendente lite*, and before a Decree, gain a priority over the second by taking the first. Such thing, however, not allowed after a Decree settling the priorities. Demurrer al-

lowed on the latter ground. Bill of review on new matter must be on leave of the Court, and affidavit showing the party's right, that it was not known to him at the time of the Decree, or since such other time as he could have used it for his advantage in the former cause. *Wortley v. Birkhead*, 418

REVIEW, COMMISSIONS OF. From the Delegates of the Ecclesiastical Court, see p. 27.

REVIVOR.

See also ABATEMENT, COSTS, &c.

1. Though a cause be abated, money may be ordered to be paid out of Court without reviving the cause, upon the consent of all the parties actually interested. *Beard v. E. Powis*. 367. *Sed vide ibid*.

2. Revivor is allowed for costs taxed. They die with the party unless taxed; and even where taxed in the lifetime of such party and the person who is to pay them is in prison, he will be discharged unless there be a revivor in a reasonable time. *White v. Hayward*, 385

Though the strict rule be not to allow revivor merely for costs, which have not been taxed, the Court leans against enforcing it, if there be any thing in the Decree yet remaining to be performed. *Johnson v. Peck*, 396

REVOCATION.

See also REPUBLICATION, &c.

1. Question as to the Revocation of a will, merely on the words, sent to be tried at Law. *Attorney General v. Lloyd*, Page 29
2. As to Revocation by marriage, and the birth of children, see p. 107.
3. Revocation of will, *protanto*, by a *veodilic* directing a sale or mortgage to pay debts. *Verney v. Verney*, 188, 189
4. After a devise of tithes, together with a real estate, a surrender of the lease under which they were held, and acceptance of a new lease, held to amount to a revocation; so that a republication was necessary. *Rudstone v. Anderson*, 373

S.

SALE.

Devise of "rents, profits, and produce," of West India Estates to be consigned to trustees, and applied by them in disencumbering an estate in Scotland of debts; and also in payment of other debts, funeral expenses, and legacies. Held, on re-hearing, that such charges could only be paid out of the annual perception of rents and profits; and that part of the former Decree which had directed a sale, was reversed. *Conyngham v. Conyngham*. 221

Grant or devise of "rents and profits," referable to a term in gross, or mere chattel interest, will pass the whole interest in the term, without further words of limitation; but it is otherwise as to a

term carved out of an inheritance. *Belt v. Mitchelson*.

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SATISFACTION.

1. As to the distinction between cases of satisfaction, and of performance, or part-performance, of covenants, &c. 3
2. See *Goodwyn v. Goodwyn*. 117
- Door v. Geary*. 132
- And *Graham v. Graham*. 134

3. Marriage settlement rectified by a strict settlement, agreeably to the ordinary course, notwithstanding it agreed with the articles *verbatim*, and both made before marriage: the Plaintiff, however, having taken a benefit under the will, which he disputed; held to have made his election, and decreed to give up part of the settled estate in satisfaction. *Roberts v. Kingsley*. 129

4. If a testator is chargeable with two annuities, and devises an annuity equal but to one, it will not be a satisfaction for either. Contra where he is not a general debtor for both. *Graham v. Graham*. 134

5. Covenant in marriage articles to purchase and settle lands. Lands purchased and suffered to descend, taken in satisfaction of it. *Lewis v. Hill*. 140

6. A sum charged on an Estate in Nevis in favour of W. held to be included in the bequest of a larger sum to W's younger children; the testatrix supposing that they were entitled to the charge, though it

was not the case: and decreed, that no more should be raised than the sum bequeathed. *Stapleton v. Convey.*

Page 186

7. A father, having to pay a legacy to his daughter, gives her a greater sum on her marriage, and no demand of the legacy, though knowledge of it during the daughter's life. This held a satisfaction, and the husband not entitled.

Seed v. Bradford. 209

8. Testator being under an obligation to pay an annuity to M. P. bequeaths the residue of his estate for the benefit of his mother and M. P. for life. This is not to be considered in satisfaction of the annuity. *Barret v. Beckford.* 219

9. Devise of the residue of real and personal estate for life, held not to be a satisfaction for a sum articulated to be laid out in lands. *Alleyn v. Alleyn.* 266

10. Vide title "MISTAKE;" and *Ramsden v. Hylton.* 350

11. Land purchased and suffered to descend, decreed to be taken as a part performance and satisfaction of marriage articles. Election. *Hucks v. Hucks.* 417

12. A debtor bequeaths a much larger legacy, upon a condition, which by a subsequent deed, it becomes impossible to perform; by the will it would not have been a satisfaction, as it was for another purpose; but being freed from the condition by the deed, it is a satisfaction. General rule that a legacy larger than,

or equal to, a debt is a constructive satisfaction; but any minute circumstance is laid hold of to take it out of that rule. *Mathews v. Mathews.*

Page 433

SCANDAL.

See also IMPERTINENCE.

1. A reference for scandal may be at any time, and even by strangers to the record, &c. Not so as to impertinence. Scandal includes impertinence; but a matter may be impertinent without being scandalous. Nothing held scandalous that is strictly relevant to the merits. *Fenhoullet v. Passavant,* 260
2. Any record of the Court may be referred for scandal at any time; [and even by strangers to the suit;] but it is otherwise as to a reference for impertinence. Though such orders are discretionary to a certain extent, the opportunity may be lost or waived. *Anonymous.* 431

SCHEDULE.

See "INTEREST," and *Barwell Parker,* 359, 360

SEAMAN.

1. Sale of a seaman's prize-money, and subsequent agreement in confirmation of it, set aside. *Taylor v. Rochfort,* 345
2. Assignment of a sailor's share of prize-money at an under-value, set aside for fraud; but still to stand as a security for what was really advanced. The same equity as to an under assignment. *How v. Weldon,* 396

SEQUESTRATION.

See in *White v. Hayward.*

385

SETT-OFF.

1. No set off on demands *en autre droit.* *Medlicot v. Bowes.* 112, 113

2. Relief in account as to payments made to a bankrupt, after a secret act of bankruptcy, when the assignees had recovered by action payments made by the bankrupt. *Bilston v. Hyde.* 159

SETTLEMENT.

See also CONSIDERATION.

After marriage voluntary, settlement after marriage voluntary and void against creditors. *Beaumont v. Thorpe.* 25

Contra if on fair consideration, though inadequate if no fraud or reasonable suspicion. 26

SHIP.

A ship pledged abroad by the Master for repairs, &c. well hypothecated; and the Court held the part owners liable each for the whole demand. *Sunsum v. Braggington.*

191

The law, however, has been since altered in the latter respect. 193, 205

SOLICITOR.

See ATTORNEY AND CLIENT, &c.

Solicitor in a cause charged with interest on money directed to be paid out for an infant's benefit, notwithstanding a deed from its grandmother, that it should not be so chargeable. Stated accounts

obtained by him, under a misrepresentation, set aside, the items being very gross. A bond obtained by him from the grandmother for the amount of fees and disbursements, decreed to stand only as a security for what was actually due on taxation. *Brown v. Pring,* 181

STOCK.

See LEGACIES.

Specific legacies of stock *et c contra.* *Avelyn v. Ward.* 184

SURCHARGE, &c.

See also ACCOUNTS.

1. As to opening, setting aside, surcharging and falsifying accounts, &c. &c. *Townshend v. Lowfield,* 31, &c.
2. See *Allen v. Papworth,* 88, 89, &c.

SURPLUS.

See RESIDUE, &c.

Surplus rents not included under the term "*portion.*" *Vane v. Vane.* 45

SURRENDER.

See also COPYHOLDS.

1. Surrender of copy-holds supplied in favour of younger children. *Banks v. Denshire.* 49
 2. Trust of a copyhold devisable without a surrender. *Allen v. Poulton.* 76
- As to another copyhold of which the testator had the legal estate, the heir put to his election. *ibid.*

SURVIVORSHIP.

See TENANT IN COMMON, and JOINT TENANT.

1. A discretionary power given

to executors is not determined by the death of one of them. *Flanders v. Clark*. 12

2. Executory trust for three, for their lives, as tenants in common, if any died without issue living at their deaths, their shares to go to survivors with contingent remainders in tail; and remainders over. Two of them dying in the lifetime of testatrix, held their shares lapsed, and went over. *Sperling v. Toll*.

Page 52

3. In a case of portions, survivorship, as between the children referred to, their not attaining 21, or marriage, tho' no express words to that effect; there being a preceding clause as to other children, where the like words were used. *Mendes v. Mendes*.

65

4. Bequest of residue between two; one of them dying in testator's lifetime, no survivorship, and his moiety is undisposed of. *Peat v. Chapman*.

241

5. See *East v. Cook*. 263
- And PARTNERSHIP, *Pearce v. Chamberlain*. 264

T.

TACKING.

See MORTGAGE and PRIORITIES.

A judgment creditor, having procured an assignment of a mortgage, allowed to tack the amount and costs. *Allen v. Papworth*. 88, 89, &c.

TENANT IN COMMON.

1. Devise of lands to four

younger children, equally share, and share alike, as tenants in common, and not as joint-tenants "with benefit of survivorship." The latter words do not infringe the positive direction; and the survivorship confined to a particular period, applicable to the distribution of the personalty. *Hawes v. Hawes*.

15

2. Executory trust for three, for their lives, as tenants in common; if any died without issue living at their deaths, their shares to go to survivors, with contingent remainders in tail, and remainders over. Two of them dying in the lifetime of testatrix, held their shares lapsed, and went over. *Sperling v. Toll*.

52

3. Devise to trustees, by sale or mortgage, to pay debts; the remainder to go, and be equally divided among three children, and the survivor of them and their heirs for ever; a tenancy in common. *Stones v. Heartly*.

96

4. Though specific performance of a contract might have been decreed against original parties, holding as tenants in common; yet where an alteration prevented a Decree as to one moiety, the Court would not direct a performance as to the other; the contract being entire, and an execution of half of it inadequate to its prime object. *Attorney General v. Day*. 115

5. Tenancy in common under a deed by a father in favour of his family, which was held

to operate in the nature of a testamentary instrument. *Rigden v. Vallier*. Page 335

TENANT FOR LIFE.

1. Tenant for life must keep down the interest of incumbrances, though the whole of the rents and profits are exhausted by it. The Court will, however, in some instances, direct a reasonable maintenance thereout, if the tenant for life be otherwise unprovided for. *Revel v. Watkinson*. 66
2. Courts of Equity will restrain tenants for life, without impeachment, &c. to a reasonable exercise of their rights. *Aston v. Aston*. 134
3. Windfalls of timber and other casualties, to whom the property belongs. *Aston v. Aston*, 175

TENANT IN TAIL.

See also ESTATE-TAIL.

1. If a tenant in tail persists in refusing to execute his contract for sale, &c. and dies, the Court will not decree the succeeding tenant in tail to fulfil it; such a one taking paramount. *Attorney General v. Day*, 115
2. Tenant in tail pays off an incumbrance, but takes no assignment. The remainder over, under the circumstances, subject to pay it to his representative. *Kirkham v. Smith*. 133
3. Questions as to infant tenants in tail, their personal representatives, &c. *Rook v. Worth*. 200

4. As to tenants in tail keeping down the interest of an incumbrance. 202

5. A father, tenant for life, procured his son, who was tenant in tail, to join in raising money, which the father received, and applied to his own use. Decreed to exonerate the estate, the son being only in the nature of a surety for it as the debt of his father. *Piers v. Piers*. 220

6. A tenant in tail coming into being after a sale of timber by agreement between a tenant for years, without impeachment of waste, except voluntary waste, and the ultimate reversioner, entitled to recover against what was received under it by the reversioner. *Garth v. Cotton*. 233

7. Books not heir-looms; and if limited to go with entailed lands, they become the property of the first tenant in tail. *Duke of Bridgewater v. Egerton*. 296

TENDER.

The right to principal and interest generally carries costs, and a tender must be very express and formal to prevent them in such a case. *Gamon v. Stone*. 162

TERM.

Grant or devise of "rents and profits," referable to a term in gross or mere chattel interest, will pass the whole interest in the term, without further words of limitation; but it is otherwise as to a

term carved out of an inheritance. *Belt v. Mitchelson.*

227

TESTAMENT, TESTAMENARY ACT, &c.

1. A deed executed on the same day as a will, held a testamentary act. *Peacock v. Monk.* 80
2. A father, by deed poll, reciting his intention of settling and assuring all his real and personal estate on his family after his decease (*inter alia*) grants, "in consideration of natural love and affection," lands to two of his children and their heirs, "to be equally divided between them," but does not make livery. This deed held to operate in nature of a testamentary instrument; and being made in consideration of natural love, &c. was held to amount to a covenant to stand seized. The children considered to take as tenants in common, both by words used, and also from the nature of the provision. *Rigden v. Vallier.* 335
3. The word "testament" includes all testamentary instruments, as a will, codocils, &c.
The word "instrument" held to signify the will alone. *Fuller v. Hooper.* 333
4. Deed-poll by a father intending to settle real and personal estate on his family after his decease, without livery; held to operate as a testamentary instrument; and to amount also to a covenant to stand seized. *Rigden v. Vallier.* 335

5. A freeman on the same day with his will, by deed assigns part of his personal estate, in trust, to separate use of his daughter. He was then aged 72, in the gout; and died in two days. The daughter had been married without consent, but he was reconciled. Held to be a testamentary disposition in fraud of the custom, and that it might be disputed by the daughter's husband. Gift of personalty by freeman, may be in life-time, or in *extremis*, if he divests himself of the property, and it is enjoyed accordingly, and if clearly not a testamentary act in fraud of the custom. *Tomkyns v. Ladbroke,* 421

TIMBER.

1. A tenant in tail coming into being after a sale of timber, by agreement, between a tenant for years without impeachment of waste, except voluntary waste, and the ultimate reversioner, entitled so recover against what was received under it by the reversioner. *Garth v. Cotton,* 233
2. Guardian or trustee for an infant, who had a contingent estate, cannot cut timber of his own authority, though it may be fit for cutting, or even for a probable benefit. Though such an act may not amount to waste, he will be enjoined. *Knight v. Duplessis* 359

TITLE.

The agent of a party having notice of incumbrances, &c. induces a necessity for that party to make all due

inquiries, &c. as to the title ; and such person cannot afterwards protect himself by procuring the legal estate. *Maddox v. Maddox*, 46

TRIAL AT LAW.

See also ISSUE, &c.

1. The fact of a marriage charged by the bill, and denied by the parties, answers (there being evidence in the cause), must be tried at law ; such matters being the proper subject for a jury. *Revel v. Fox*, Page 340
2. A doubtful modus not determined by a Court of Equity, without a trial at law. *Chapman v. Smith*, 395

TRUST, TRUSTEES, &c.

1. Trustees, or others in a confidential character, cannot derive advantage from a purchase of the trust, or confided, property. *Whelpdale v. Cookson*, 8, &c.
2. A father having provided for his eldest son, but not for his other children, takes a security for the proceeds of an estate sold in the joint names of himself and eldest son. Held a trust for the father's personal representatives. *Pole v. Pole*, 45
3. Testator, on renewal of a lease, took it in the names of his brother and himself, paying the fines and receiving the profits himself ; held, on the ground of intention, though proved but by one witness, to be no constructive trust, but an implied gift of the surviving interest. *Maddison v. Andrew*, 45, 46

4. Limitations apparently legal as uses executed, held to be trusts, from the purposes to be answered. *Bagshaw v. Spencer*, 82
5. Trustees for the presentation to a living, cannot make proxies to chuse an incumbent ; though if a choice were properly made, they might do so for the mere purpose of signing the presentation. *Attorney-General v. Scott*, 182-3
6. It is not necessary that the word "heirs" should be inserted to carry the fee where the purposes of a trust cannot be answered, unless the trustees have a fee. *Gibson v. Lord Montfort*, 203
7. A trustee, with notice of his appointment as such, interfering with the subject matter, cannot repudiate the trust, and say he acted merely as factor or agent. *Conyngnam v. Conyngnam*, 221
8. As to the rights, powers, and duties of trustees to preserve contingent remainders, see in *Garth v. Cotton*. 233
9. The remedy for a breach of trust is personal ; and money produced by one, and laid out in an estate in Ireland, could not be specifically followed. The party's assets were, however, marshalled in favour of the claim. *Coxe v. Bateman*. 255
10. Trust deed, whereby trustees were to give the residue of A's estate "among his "friends and relations where "they should see most necessity, and as they should think most just." Though in other cases the

Court will not interpose where trustees, declining to act, have a power to distribute generally according to their discretion, without any defined object, it was held that here a rule was laid down; the word "friends" meaning "relations;" and that the Court could judge of the respective families' necessities and occasions by a reference to the Master. *Gower v. Mainwaring*. Page 283

11. Query, whether a trustee, or his heir, can claim admittance to copyholds, or hold for their own benefit, where the cestuy qu'a trust has died without heirs?

It is a question whether trust estates in copyholds escheat to the Lord in such a case?

If they do, and the trustee has been admitted, it seems he would be considered as holding for the benefit of the Lord, and decreed to surrender.

If they do not escheat, the question is, who is entitled to the beneficial interest?

348, 349

It has been said, a Court of Equity would decree such an estate to be sold for the benefit of the next of kin: but that seems very doubtful. 349

Query, therefore, whether, in such a case, the Lord could refuse the trustee admittance; and, if compellable by law to admit him, he would not be entitled to the assistance of a Court of Equity?

ibid.

12. Fine by persons in possession, and non-claim, the le-

gal estate being in trustees, held not to bar an equitable charge under the deed of trust; though a great length of time had elapsed. *Earl of Pomfret v. Lord Windsor*. Page 389

13. Trust estate will pass by a general devise. 414

14. Infant trustee.—A Decree having been made for sale of an estate, and that a trustee should join in the conveyance; that trustee dying, his infant heir bound to execute the conveyance, under the stat. 7 Ann. c. 19.

Such a Decree against the ancestor would obviate any doubt, as to whether his infant heir were, or not, a trustee within the act. *Hawkins v. Obeen*, 414

15. Though every trustee of part of the personal estate is not to be called to account by a particular pecuniary legatee, but only by the executor or administrator; and though such trustee who receives the trust money, and thereby becomes a debtor, is not to be considered and chargeable as executor, merely because he is so named in a will, yet where he is made a co-executor, and does not renounce, whilst he receives the trust money, he is properly made a Defendant to a suit for a general account, and is accountable therein for his receipts; and this the more especially, since his being named executor is a release of the debt at law. *Moore v. Moore*, 422, 423

16. Executors and administra-

- tors are considered as trustees in many instances. 390
17. Devise in trust to pay debts is not within the statute of fraudulent devises. S. P. 1 Bro. 311. Vide also Mr. *Sanders's* note to *Plunket v. Penon*, 2 Atk. 292. Trustees to pay debts may fairly raise by sale or mortgage, without waiting for a Decree [No suit being instituted.] *Earl of Bath v. Earl of Bradford*. 420
18. Where a trustee for an infant has money to lay out for his benefit, and employs it in his own trade, &c. the Court will exercise an option for the infant, either to have interest or the profits made. *Anonymus*, 430

TYTHES.

1. Vicar failing in a suit for tythes in kind, and a modus set up, which was good in its nature, though imperfectly pleaded, may yet recover in that suit the arrears due under such modus. *Carte v. Ball*. 4
2. Partition will be decreed in Equity as to tythes. *Baxter v. Knollys*, 205

U.

USURY.

1. In directing accounts, where there has been usury, extortion, or oppression, the Court often, by its Decree, directs every thing doubtful to be taken most strongly against the person guilty of such proceedings. *Mitford v. Featherstonhaugh*, 379

2. Assignees of a bankrupt are not compellable to pay what is really due on a transaction attended with usury, under the general jurisdiction in bankruptcy. It is otherwise where they apply to a Court of Equity by a bill to be relieved. *Ex parte Skip*, 392

V.

VESTING.

1. Legacy to A. to be at her disposal, if she married with consent, and not otherwise. She dying without having been married at all, it was held never to have been vested. *Elton v. Elton*. 5
2. Legacy to J. F. under restrictions; the principal to be paid as "the executors" should judge necessary for him, and if he died without issue, to revert to testator's family; with interest in the meantime for what should continue in their hands. This discretionary power held to be well executed by the will of a surviving executrix. *Flanders v. Clark*, 12
3. Legacy to E. to be paid at 21, or marriage, but if she died before, then to the younger children of F. E having died unmarried, under 21, held to vest in such of the younger children as were living at that time. *Ellison v. Airey*, 73
4. Legacy to F. when he shall attain 25, with directions for its investment, and payment of interest in the meantime for education, and for part of the principal to be applied in

placing him out. Held a vested interest, and transmissible, though he died under that age. *Fonnereau v. Fonnereau*, Page 74

5. Bequest of 3000*l.* to Jane, the wife of C. for the use of her younger children, to be distributed as she should appoint, &c. All her children by C. being born at the date of the will, and death of testator, held vested as a present legacy to them, subject to variation as between them; and not to extend to children by Jane's future marriage. One, therefore, who was a younger child at the death of testator, held entitled, though he afterwards became an elder. *Coleman v. Seymour*, 113
6. Bequest of 400*l.* to R. to be paid in a year; and of a further sum of 100*l.* at the death of his mother. This last also held vested. *Jackson v. Jackson*, 115
7. Bequest to younger children of testator's son, to be paid at 21; held vested in those born at the time of testator's death. *Horsely v. Chaloner*, 280
8. Bequest of residue of personal estate after a life interest to the use of all and every the children of testator's daughter equally; to be transferred, delivered, and paid to them severally, when by law, able to receive and give discharges. Held to be vested in each child on coming into being, and transmissible; though subject to be varied by the birth of others. *Exel v. Wallace*, 295
9. Trust of the residue of a

term with a double aspect; viz. Settlement on marriage, by deed, of a leasehold estate in trust for the husband and wife for life; and after the decease of the survivor, to be assigned by the trustees, with the rents and profits, to the eldest son; "and for want of such issue of such son," to daughters.

A son having been born, who died without issue in the life of the mother, held, that it did not vest in him, but was a good remainder to an only daughter at the death of the surviving parent.

The Decree in this point affirmed on appeal 2 Ves. 318. Courts will avoid a construction leading to a perpetuity and void devise, if possible. So they will, in marriage settlements, consider the general intent as in favour of the issue described, and not let property revert, or go to a father as the representative of one child to the prejudice of the rest, if no positive reason for it to be clearly inferred. *Exel v. Wallace*. Page 295-6

10. Grandmother under a power creates, by deed, a term to commence after her death, for raising money for younger children, as their father should appoint; if no appointment, equally; if but one, besides the eldest, then to that one; if none except the eldest, then to him; if no eldest son, then to her own executors. At the date of the deed there was one grandson and one granddaughter. The father afterwards had another

son, and died without appointment. The eldest son having died under age, held that the whole sum belonged to the daughter, and that the younger son, having thus become an eldest son was excluded. Elder son unprovided for considered as a younger. Vesting not suspended, in general, by a power to appoint. Portions not to be raised for the representatives of a child, who died before it was naturally required. *Lord Tyrconnel v. Webb.* Page 325

11. Trust "to raise" 5000*l.* portion, "and pay it" to such younger child as the father should appoint; for want of appointment to the younger children at 21, with interest for their maintenance, &c. in the meantime, &c. &c. The only younger child died at two years old. Held not to be vested in him, so as to be claimed by the father as his representative. Proportions by will governed by rules from the civil law, not applicable to a deed. *Hubert v. Parsons.* Page 337

VOLUNTARY GIFTS, &c.

See also CREDITORS.

As to voluntary gifts, amounting to a complete conveyance or transfer of the property, in order to be valid, &c. &c. see in *Peck v. Parrot.* 128

W.

WARD OF COURT.

See also GUARDIAN AND WARD.

Order on an attempt to marry a Ward of Court clandestinely. *Beard v. Travers.* 154

WARRANTY.

The word "grant" does not amount to an entire warranty in Equity, nor always at law, as where particular covenants are inserted. *Clarke v. Samson.* Page 69

WASTE.

1. Courts of Equity will restrain tenants for life, without impeachment, &c. to a reasonable exercise of their rights. *Aston v. Aston.* 134
2. A jointress having given leave to the next in remainder for life, without impeachment, &c. to cut timber, the remainder-man in tail having acquiesced, and encouraged his doing so, the latter was restrained by perpetual injunction from bringing action of waste against the jointress. *Aston v. Aston.* 175
3. A tenant in tail coming into being after a sale of timber by agreement between a tenant for years, without impeachment of waste, except voluntary waste, and the ultimate reversioner, entitled to recover against what was received under it by the reversioner. *Garth v. Cotton.* 233
4. As to tenants for life, for years, &c. without impeachment of waste, and the rights, powers, and duties of trustees to preserve contingent remainders. *ibid*
5. It is waste in a guardian to convert ancient pasture into arable land, even for a temporary benefit. *Clark v. Thorp.* 329

WILL.

See also DEVISE, REPUBLICATION, REVOCATION, CONSTRUCTION, &c.

1. See Page 29
2. In a suit to establish a will in Equity, *all* the witnesses to it should be examined, or proof given of their deaths, &c. *Ogle v. Cook.* 103
3. Devise in case of testator dying before his return from Ireland. Having returned, &c. the disposition held ineffectual. *Parson v. Lanoe.* 107
4. Issues at law on a forged will, and orders made after the verdict. *Barnesly v. Powell.* 143, &c.
5. Republication as to lands purchased after a will by a codicil made after the purchase. *Gibson v. Lord Montfort.* 203, 204.
6. The word "*testament*" includes all testamentary instruments, as a will, codicils, &c.
The word "*instrument*" held to signify the will alone. *Fuller v. Hooper.* 333

WILLS (STATUTE OF.)

The Statutes of Wills, *et de donis conditionalibus*, do not extend to the Isle of Man.

That Island made unalienable by a private Act of Parliament against heirs general, on failure of issue male. *Bishop of Sodor and Man v. Earl of Derby.* 357

WINDFALLS.

Windfalls of timber and other casualties, to whom the property belongs. Tenants for

life, Remainder-men, &c. *Aston v. Aston.* 175

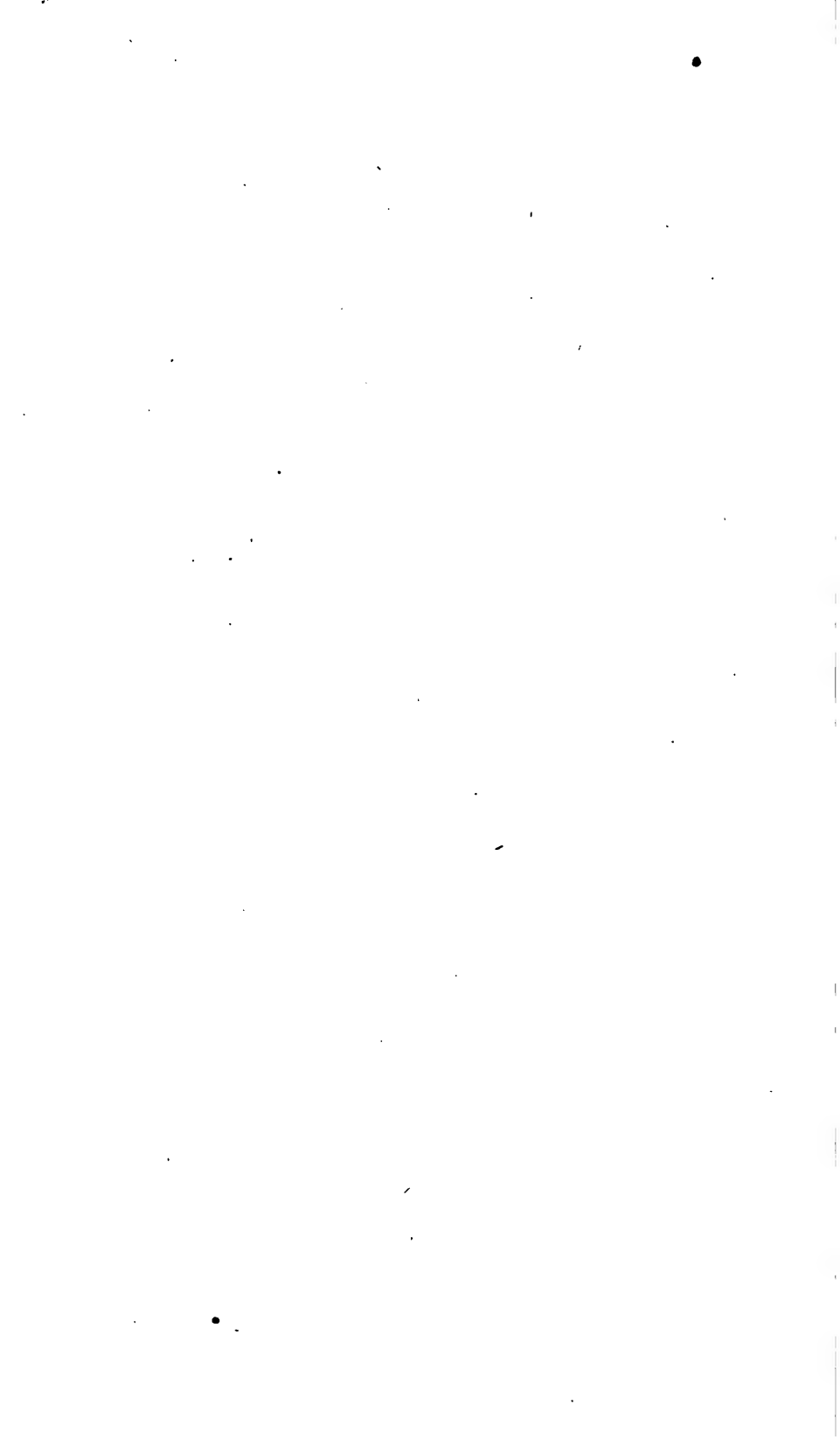
WITNESS.

See also EVIDENCE, ANSWER, &c.

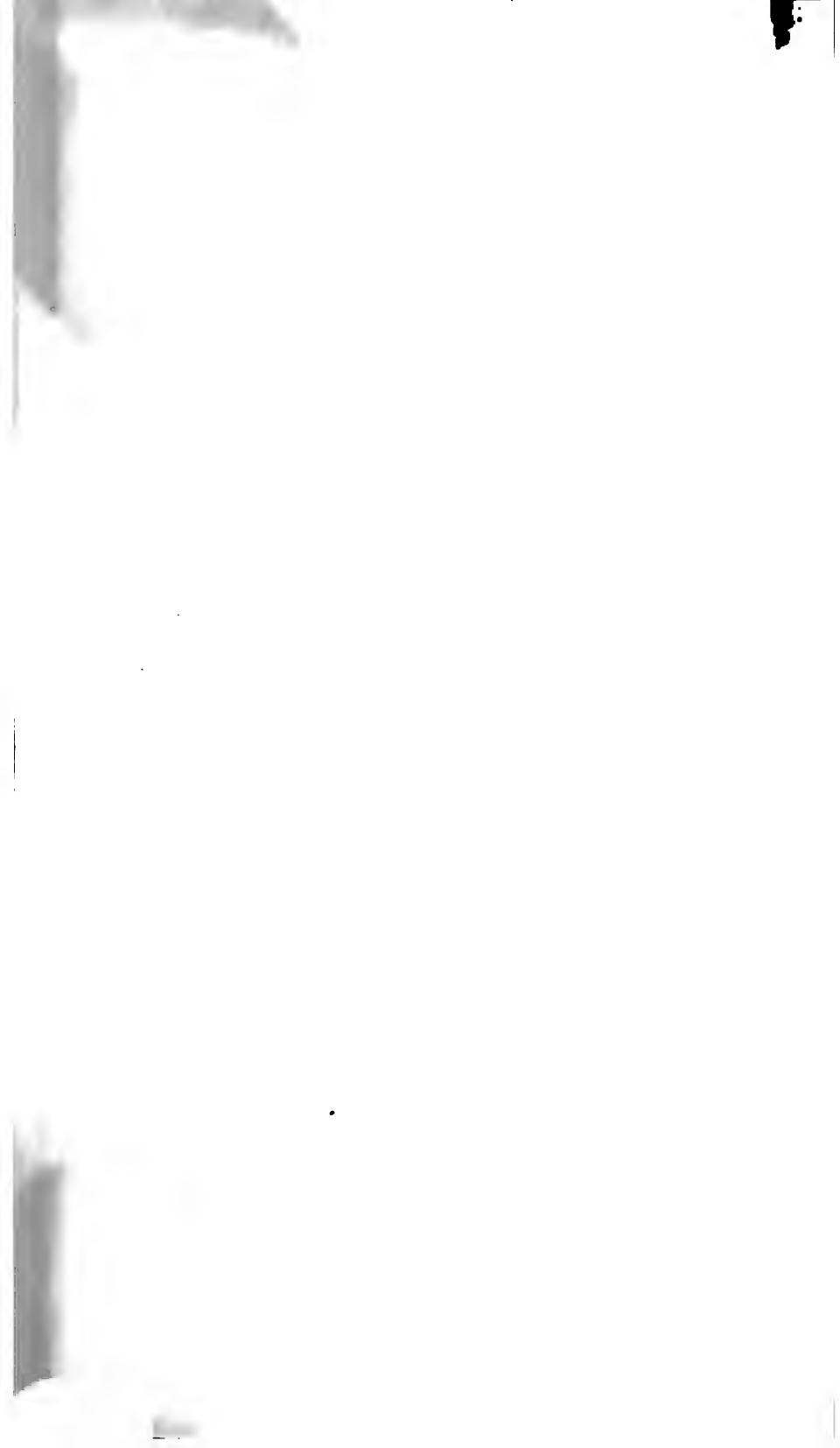
1. The attestation of articles by a mother, who had suffered the marriage of her daughter to take place, upon an understanding that she would give £1000 portion, she knowing the purport of them, is equivalent to her actual signature of them as a party. *Welford v. Bezely.* 6
2. Though one witness cannot sustain a suit against a distinct denial by answer, the latter must be precise and positive. *Arnott v. Biscoe.* 67
3. In a suit to establish a will in equity, *all* the witnesses to it should be examined, or proof given of their deaths, &c. *Ogle v. Cook.* 103
4. A mere witness cannot be made a Defendant for discovery of that, unto which he is examinable as such. *Plummer v. May.* 185
Vide, however, per Lord *Ellenborough*, C. on this case, 7 *Ves.* 289, 290.
A party cannot examine his own witness on a *voir dire.* 185
5. As to a witness to a will, who was a creditor, before the act 25 Geo. II. c. 6. *Pryse v. Lloyd.* 210
5. Depositions of a witness being too general, he was directed to be examined upon interrogatories before a Master. *Bishop v. Church.* 288

7. A party to a cause may be examined on new inrerrogatories in the Master's office without a new order, the Master being the proper judge. In the case of a witness it is different, for under a commission to examine, there must be a new order for new interrogatories. *Cowslade v. Cornish*. Page 340

THE END.









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